Supreme Court, U.S.
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No. 05-

In the Supreme Court of the United States

NEXBANK SSB, ET AL.,
Petitioners,

v.

AMERICAN HOMEPATIENT, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a bankruptcy court consider a debtor's specific risk profile in determining the discount rate for "deferred cash payments" under 11 U.S.C. §1129(b)(2)(A)(i)(I)?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner NexBank, SSB (formerly known as Heritage Bank, SSB, as successor to Bank of Montreal), as Agent for the senior secured lenders[1] (collectively, the "Lenders"), Petitioners in the above-styled and numbered cause, makes this Disclosure of Corporate Affiliations and Corporate Interest pursuant to SUP. CT. R. 29.6, and would respectfully show the Court as follows:

A. Petitioners (Lenders under the Fifth Amended and Restated Credit Agreement, dated as of May 25, 2001):

1. Aeries Finance-II Ltd.
2. Bank of America, N.A.
3. California Public Employees' Retirement System
4. Emerald Orchard Limited
5. General Electric Capital Corporation

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[1] NexBank, SSB (formerly known as Heritage Bank, SSB, as successor to Bank of Montreal) is the Administrative Agent under the Fifth Amended and Restated Credit Agreement, dated as of May 25, 2001 (the "Credit Agreement"), for Aeries Finance-II Ltd., Bank of America, N.A., California Public Employees' Retirement System, Emerald Orchard Limited, General Electric Capital Corporation, Highland Crusader Offshore Partners, L.P., Jasper CLO Ltd., Loan Funding VII LLC, Morgan Stanley & Co. Inc., Pam Capital Funding L.P., PamCo Cayman Ltd., Restoration Funding CLO, and Southfork CLO, Ltd. As agent and representative of the Lenders, the Agent is also the Secured Party with respect to all collateral that secures the Debtors' obligations to the Lenders, and the Agent is the Beneficiary of all Subsidiary Guaranties (capitalized terms in this sentence are defined in the Credit Agreement). NexBank, SSB is not a Lender under the Credit Agreement.

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6. Highland Crusader Offshore Partners, L.P.
7. Jasper CLO Ltd.
8. Loan Funding VII LLC
9. Morgan Stanley & Co. Inc.
10. Pam Capital Funding L.P.
11. PamCo Cayman Ltd.
12. Restoration Funding CLO
13. Southfork CLO, Ltd.

B. Respondents are AHP Finance, Inc.; AHP Alliance of Columbia; AHP Home Care Alliance of Gainesville; AHP Home Care Alliance of Tennessee; AHP Home Care Alliance of Virginia; AHP Home Medical Equipment Partnership of Texas; AHP Knoxville Partnership; AHP L.P.; Allegheny Respiratory Associates, Inc.; American HomePatient, Inc., a Delaware corporation; American HomePatient, Inc., a Tennessee corporation; American HomePatient of Arkansas, Inc.; American HomePatient of Illinois, Inc.; American HomePatient of Nevada, Inc.; American HomePatient of New York, Inc.; American HomePatient of Texas, L.P.; Colorado Home Medical Equipment Alliance, LLC; Designated Companies, Inc.; National I.V., Inc.; The National Medical Rentals, Inc.; National Medical Systems, Inc.; Northeast Pennsylvania Alliance, LLC; Northwest Washington Alliance, LLC; Sound Medical Equipment, Inc.; and Volunteer Medical Oxygen & Hospital Equipment Co.

RULE 29.6 STATEMENT

Petitioner Bank of America, N.A. is a subsidiary of Bank of America Corporation.

Petitioner Emerald Orchard Limited is a subsidiary of Scotiabank (Ireland) Limited.

Petitioner General Electric Capital Corporation is wholly owned by General Electric Capital Services, Inc., a Delaware corporation, which is itself owned by General Electric Company (99.81% ownership). General Electric Company is a New York corporation whose stock is listed on the New York Stock Exchange.

Petitioner Morgan Stanley & Co. Inc. is owned by Morgan Stanley.

Aside from the subsidiary and affiliate relationships described above, there are no publicly owned corporations, not a party to the appeal, with a financial interest in the outcome of this appeal.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

RULE 29.6 STATEMENT iv

TABLE OF AUTHORITIES vii

OPINIONS AND ORDER BELOW 1

BASIS FOR JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH *TILL*'S INSTRUCTION THAT THE DETERMINATION OF THE APPROPRIATE DISCOUNT RATE REQUIRES CONSIDERATION OF CHARACTERISTICS SPECIFIC TO THE DEBTOR AND TO THE LOAN 9

II. THE LOWER COURTS ARE UNCERTAIN AS TO WHETHER AND HOW *TILL* APPLIES TO CHAPTER 11 REORGANIZATIONS 12

III. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER THE DETERMINATION OF THE APPROPRIATE DISCOUNT RATE REQUIRES CONSIDERATION OF CHARACTERISTICS SPECIFIC TO THE DEBTOR 16

IV. IF *TILL* DOES NOT APPLY TO CHAPTER 11 REORGANIZATIONS, THE COURTS OF APPEALS REMAIN DIVIDED ON WHETHER THE DETERMINATION OF THE APPROPRIATE DISCOUNT RATE IN A CHAPTER 11 CASE REQUIRES CONSIDERATION OF CHARACTERISTICS SPECIFIC TO THE DEBTOR, AND THE COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS IN THIS CASE . . 20

CONCLUSION 22

APPENDIX

Appendix A - Sixth Circuit Order Denying Rehearing and Rehearing En Banc, Dated 2/1/06 . . . . . 1a

Appendix B - Sixth Circuit Opinion, Dated 8/16/05 . . . . . 3a

Appendix C - District Court Order and Memorandum, Dated 9/12/03 . . . . . 23a

Appendix D - Bankruptcy Court Memorandum, Dated 5/15/03 . . . . . 51a

Appendix E - Sixth Circuit Joint Appendix Excerpts 132a

TABLE OF AUTHORITIES

Cases

Farm Credit Bank of Spokane v. Fowler,
903 F.2d 694 (9th Cir. 1990) 19, 21

Financial Security Assurance Inc. v. T-H New Orleans Limited Partnership,
116 F.3d 790 (5th Cir. 1997) 16, 21

Grutter v. Bollinger,
539 U.S. 306 (2003) 14

Household Auto. Fin. Corp. v. Burden,
315 F. 3d 671 (6th Cir. 2003) 7, 9, 10, 11, 12

Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 6

Marks v. United States,
430 U.S. 188 (1977) 14

Memphis Bank & Trust Co. v. Whitman,
692 F.2d 427 (6th Cir. 1982) 9, 10, 11

Mississippi State Tax Commission v. Lambert,
194 F.3d 679 (5th Cir. 1999) 17, 19, 21

Official Unsecured Creditor's Comm. of LWD, Inc. v. K&B Capital, LLC,
332 B.R. 543 (Bankr. W.D. Ky. 2005),
aff'd, No. Civ. A. 505CV-108-R,
2006 WL 709479 (W.D. Ky. Mar. 15, 2006) 15

Prudential Ins. Co. of Am. v. Monnier,
755 F.2d 1336 (8th Cir. 1985) 19, 20, 21

In re Prussia Assocs.,
322 B.R. 572 (Bankr. E.D. Pa. 2005) 15

Till v. SCS Credit Corp.,
541 U.S. 465 (2004) . . . . . *passim*

Travelers Ins. Co. v. Bryson Props., XVIII ,
961 F.2d 496 (4th Cir. 1992) 21

United States v. Alcan Aluminum Corp.,
315 F.3d 179 (2d Cir. 2003) 16

United States v. Camino Real Landscape Maintenance Contractors, Inc.,
818 F.2d 1503 (9th Cir. 1987) 18, 19

United States v. Doud,
869 F.2d 1144 (8th Cir. 1989) 20

United States v. Neal Pharmacal Company,
789 F.2d 1283 (8th Cir. 1986) 17, 19

United States v. Southern States Motor Inns, Inc.,
709 F.2d 647 (11th Cir. 1983) 18, 19, 21

Statutes

11 U.S.C. § 1129 20
11 U.S.C. § 1129(a)(7)(A)(ii) 12
11 U.S.C. § 1129(a)(7)(B) 12
11 U.S.C. § 1129(a)(8)(A) 3
11 U.S.C. § 1129(a)(9) 3

11 U.S.C. § 1129(a)(9)(B)(i) 12
11 U.S.C. § 1129(a)(9)(C) 12, 17, 18
11 U.S.C. § 1129(a)(11) 7
11 U.S.C. § 1129(b) 6, 14
11 U.S.C. § 1129(b)(1) 3
11 U.S.C. § 1129(b)(2) 1
11 U.S.C. § 1129(b)(2)(A) 3
11 U.S.C. § 1129(b)(2)(A)(i) 3
11 U.S.C. § 1129(b)(2)(A)(i)(I) i
11 U.S.C. § 1129(b)(2)(A)(i)(II) 12, 14, 16
11 U.S.C. § 1129(b)(2)(A)(II) 6
11 U.S.C. § 1129(b)(2)(B) 12
11 U.S.C. § 1129(b)(2)(C)(i) 12
11 U.S.C. § 1173(a)(2) 12
11 U.S.C. § 1225(a)(4) 12
11 U.S.C. § 1225(a)(5)(B) 19
11 U.S.C. § 1225(a)(5)(B)(ii) 12
11 U.S.C. § 1225(b)(1) 12
11 U.S.C. § 1228(b)(2) 12
11 U.S.C. § 1325(a)(4) 12
11 U.S.C. § 1325(a)(5)(B)(ii) 12
11 U.S.C. § 1325(b)(1)(A) 12
26 U.S.C. § 6621 . . . . . 17, 18
28 U.S.C. § 1254 1

Other Authorities

Ralph Brubaker, *Cramdown Interest Rates: Disarray Dominates* Till . . . *?*, 24 BANKR. L. LETTER No. 8, Aug. 2004 15

Ronald F. Greenspan & Cynthia Nelson, *'Un*Till*' We Meet Again: Why the* Till *Decision Might Not Be the Last Word on Cramdown Interest Rates*, AM. BANKR. INST. J., Dec.-Jan. 2004 15

April E. Kight, Recent Development, *Balancing the* Till*: Finding the Appropriate Cram Down Rate in Bankruptcy Reorganizations After* Till v. SCS Credit Corporation, 83 N.C. L. REV. 1015 (2005) 16

7 ALAN N. RESNICK ET AL., COLLIER ON BANKRUPTCY, 15TH EDITION REVISED ¶ 1129.06[1][c][ii][B] (2005) 15, 18, 19, 20

Thomas J. Yerbich, *How Do You Count the Votes—or Did* Till *Tilt the Game?*, AM. BANKR. INST. J., July-Aug. 2004 15

OPINIONS AND ORDER BELOW

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BASIS FOR JURISDICTION

The court of appeals entered judgment and issued its opinion on August 16, 2005. Pet. App. 3a. The court of appeals denied Petitioners' timely petition for rehearing en banc on February 1, 2006. Pet. App. 1a. The Court has jurisdiction under 28 U.S.C. §1254.

STATUTE INVOLVED

11 U.S.C. §1129(b)(2) provides, in pertinent part:

> For the purposes of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides—
>
> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash

> payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property . . . .

STATEMENT OF THE CASE

Petitioners[2] are secured creditors of Debtors American Homepatient, Inc, a Delaware corporation, and twenty-four of its affiliates and subsidiaries. Pet. App. 51a-52a. As of July 2002, the Debtors owed Petitioners approximately $275 million, and Petitioners had liens on substantially all of Debtors' assets. Pet. App. 56a, 59a-60a. In July 2002, Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Pet. App. 54a. Debtors filed their Second Amended Joint Plan of Reorganization ("Plan") in January 2003. Pet. App. 64a. The Plan (1) valued the collateral securing Petitioners' claim at $250 million, limiting the secured portion of Petitioners' claim to that amount; (2) provided that Petitioners would receive a promissory note ("Note") with a principal amount of $250 million, the value of their secured claim, which note would bear interest at a rate based on the 6-year Treasury note plus 350 basis points, or approximately 6.8% at the time of Plan confirmation; and (3) gave Petitioners an unsecured claim for the remaining amount that Debtors owed. Pet. App. 62a-64a, 107a; J.A. 559-61. Petitioners objected to the Plan, arguing that it failed to provide them the present value of their claim because the proposed discount rate was calculated without regard to the

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[2] "Petitioners" refers, as appropriate, to Petitioners and/or Petitioners' predecessors-in-interest.

reorganized Debtors' capital structure[3] and risk profile. Pet. App. 107a-108a. Specifically, the Plan's discount rate failed to account for the reorganized Debtors' particular risk profile, including the fact that the reorganized Debtors' liabilities exceeded their assets; that the reorganized Debtors had approximately twice the ratio of debt to earnings before interest, taxes, depreciation and amortization as the industry average; and that the reorganized Debtors' future revenues were susceptible to adverse changes in Medicare and Medicaid policies and to pricing pressures from other third-party payers. Pet. App. 27a, 86a, 106a; J.A. 650-51.

Although the approval of a Chapter 11 reorganization plan generally requires the approval of each class of creditors whose interests would be impaired under the plan, a bankruptcy court may "cram down" a plan over the objection of an impaired class if the court finds that the plan satisfies certain requirements. *See* 11 U.S.C. §1129(a)(8)(A), (9). One of these requirements is that the plan be "fair and equitable" with respect to each impaired class. 11 U.S.C. §1129(b)(1). The Bankruptcy Code provides that a plan must provide for a secured creditor in one of three ways in order to be fair and equitable. 11 U.S.C. §1129(b)(2)(A). The most common way, and the way at issue in this case, requires that the plan provide that the creditor retain its lien upon the debtor's property to the extent of the amount of the secured claim and that the creditor receive "deferred cash payments . . ., of a value, as of the effective date of the plan, of at least the value of such [creditor]'s interest in the estate's interest in such property." 11 U.S.C. §1129(b)(2)(A)(i).

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[3] The "capital structure" of a company refers to its form of financing, generally described in terms of debt and equity. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 301 (1988).

Accordingly, an essential component of many cram downs is the discount rate that is applied to the deferred cash payments to ensure that their present value is at least the value of the secured claim.

At trial, the parties adopted two distinct methods to determine whether the Plan applied the correct discount rate. Petitioners argued that the proper discount rate must reflect the rate that the market would require Debtors to pay for financing in the amount of Petitioners' secured claim. Pet. App. 108a. This market rate would necessarily take into account loan-specific and debtor-specific criteria (*e.g.*, the amount financed, the ratio of the amount financed to Debtors' assets ("loan-to-value ratio"), and Debtors' leverage[4]). Pet. App. 112a-114a. Petitioners presented uncontroverted evidence that the market would provide Debtors $250 million in financing through a mixture of senior debt, mezzanine debt, and equity that would have a blended rate of approximately 12.16%. Pet. App. 112a-114a.[5]

In sharp contrast, Debtors' discount rate – the rate approved by the bankruptcy court, and affirmed on appeal by the district court and the court of appeals – applied a version of the "coerced loan" theory, which, according to Sixth

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[4] A widely recognized definition of leverage that is applicable to this case is the ratio of a debtor's interest-bearing debt to its earnings before interest, taxes, depreciation, and amortization ("EBITDA"). *See* J.A. 1211 (Debtors' expert, Mr. Hurst) ("we define leverage as the total interest earnings debt divided by EBITDA, earnings before interest, depreciation, taxes. That would be leverage.").

[5] The expert for the Debtors agreed that the market would require a rate in excess of 12%. Pet. App. 140a; J.A. 1184.

Circuit precedents, explicitly does not consider loan-specific or debtor-specific criteria. Pet. App. 110a-11a. Debtors thus instructed their experts to give no consideration to the loan-to-value ratio or to Debtors' leverage. Pet. App. 133a. Instead, Debtors' experts from Houlihan Lokey Howard & Zukin relied on the interest rates on recently issued non-investment grade debt in the healthcare industry, the interest rates on recently issued senior debt in the healthcare industry, and the difference in interest rates on recently issued amortizing and non-amortizing investment grade debt. Pet. App. 111a. Although consideration of these factors led Debtors' experts to testify that 6.8% was the proper discount rate for senior secured debt in the home healthcare industry, they conceded that the market would not provide to Debtors, and Debtors could not obtain, a senior secured loan in the amount of $250 million. Pet. App. 112a, 138a-141a. Debtors' experts also testified that the market would provide Debtors with $250 million in financing (consisting of the mixture of financing sources that Petitioners identified) at a blended rate of return of approximately 12%. Pet. App. 140a; J.A. 1184.

Thus, on this crucial question, the evidence was undisputed. The experts for all parties agreed that, in light of the Debtors' loan-specific and risk-specific characteristics, the market would require a rate of return of over 12% for these Debtors to obtain the $250 million in financing represented by the $250 million note given to the Petitioners. Such a rate of return would be necessary because, as the undisputed evidence also showed, the Debtors would be insolvent upon their exit from bankruptcy, with total debt approximately 6 times EBITDA, about twice the average in Debtors' industry. Pet. App. 137a; J.A. 1213; Pet. App. 138a ("The assumption inherent in our analysis is that you could borrow two-and-a-half to three times senior debt, and that's what these rates are driven off of.").

The evidence was also undisputed that the Class 2 secured claim note Petitioners received did not have a present value of $250 million.[6] The Debtors presented no evidence at trial on this issue, and their experts Mr. Hurst and Mr. Rosen specifically declined to opine that the Class 2 note had a present value of $250 million, or, for that matter, any other value. Pet. App. 138a-141a. Petitioners' expert, Mr. Benjamin, the only witness who testified to the present value of the Class 2 note, testified that the present value of the stream of payments represented by the $250 million note provided for in the Debtors' Plan is only $194 million. Pet. App. 141a.

Section 1129(b) requires that a reorganization plan provide each holder of a secured claim with "deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." 11 U.S.C. § 1129(b)(2)(A)(II). *See also Till v. SCS Credit Corp.*, 541 U.S. 465, 469 (2004) (plurality opinion) (where the debtor's plan provides for installment payments, "the amount of each installment must be calibrated to ensure that, over time, the creditor receives disbursements whose total present value [as of the effective date of the plan] equals or exceeds that of the allowed claim."). The plain language of the statute requires that the $250 million note given to the Petitioners be worth $250 million on the open market. If Section 1129(b) is construed according to its plain language, reversal of the court of appeals is required on this point alone. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("when the statute's language is plain, the sole

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[6] Indeed, Debtors' counsel conceded the point during oral argument in the court of appeals.

function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." (quotation omitted)).

Before this Court's decision in *Till*, a plurality decision rejecting the "coerced loan" theory in the Chapter 13 cram down context, the bankruptcy court adopted Debtors' proposed discount rate. Pet. App. 120a-21a. Relying on *Household Automotive Financial Corp. v. Burden* (*In re Kidd*), 315 F.3d 671 (6th Cir. 2003), the bankruptcy court elected "to consider 'more generally applicable rates' and not loan-specific rates." Pet. App. 117a. Therefore, the bankruptcy court rejected Petitioners' expert's "blended rate testimony as giv[ing] relevant information to a loan-specific situation, but . . . not provid[ing] helpful testimony as to the broader general market place from which this court must assign an appropriate rate." Pet. App. 120a. The bankruptcy court also declined to assess whether the feasibility of the Plan affected the risk that Debtors' would default on their obligations thereunder. Instead, the court concluded that, because it had already found that the Plan was feasible for purposes of 11 U.S.C. §1129(a)(11), the Debtors qualified "'for a standard, actual market rate.'" Pet. App. 119a.

On appeal to the district court (also before the Court's *Till* decision), Petitioners again stressed that the Plan's proposed discount rate gave no consideration to loan-specific and debtor-specific criteria, arguing that the Plan's discount rate "is lower than a market rate of return required by reference to actual market rates for financing available to borrowers in the same industry as the Debtor." Pet. App. 43a. The district court also relied on *Kidd* and held that the determination of the appropriate discount rate "'does not entail an analysis of any particular debtor's credit rating . . . .'" Pet. App. 45a. That is, the district court

declined to consider loan-specific and debtor-specific criteria in favor of a "coerced loan" approach.

After the district court's decision, but before the court of appeals' review, this Court decided *Till*, which involved the appropriate method for determining the discount rate in a Chapter 13 cram down. There was no majority opinion in *Till*. However, much of the analysis in *Till* is directly applicable to this case. The plurality opinion in *Till* concluded that the proper determination of a discount rate required consideration of the risk that the debtor would default on its obligations under the reorganization plan. *Till*, 541 U.S. at 479 (plurality opinion); *cf. id.* at 488-89 (Thomas, J., concurring) ("[I]f the 'property to be distributed' under a Chapter 13 plan is a note . . ., the value of that note necessarily includes the risk that the debtor will not make good on that promise."); *id.* at 491 (Scalia, J., dissenting) ("[The plurality and dissent] agree that any deferred payments to a secured creditor must fully compensate it for the risk that such a failure will occur."). The plurality opinion further stated that, in assessing that risk, the bankruptcy court should consider "such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan." *Id.* at 479 (plurality opinion); *cf. id.* at 499 (Scalia, J. dissenting) ("[T]he most relevant factors bearing on risk premium are (1) the probability of plan failure; (2) the rate of collateral depreciation; (3) the liquidity of the collateral market; and (4) the administrative expenses of enforcement."). The plurality opinion also noted that, although no market of willing cram down lenders existed in the Chapter 13 context, such a market did exist in the Chapter 11 context. *Id.* at 476 n.14 (plurality opinion). Therefore, "when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." *Id.*; *cf. id.* at 499 (Scalia, J., dissenting) ("[T]he

task of assessing all these risk factors is entrusted to the entity most capable of undertaking it: the market." (citation omitted)).

Before the court of appeals, Petitioners relied upon *Till* to argue "that the bankruptcy court should have taken 'loan-specific' criteria into account when adjusting the appropriate cramdown rate." Pet. App. 17a. Despite the fact that the bankruptcy court explicitly rejected loan-specific evidence of the applicable discount rate and relied on an expert opinion that expressly disregarded essential characteristics of the Debtors and of the promissory note, the court of appeals stated that the bankruptcy court "in fact sought to determine what an efficient market would have produced for the loan that the lenders provided" and that the Debtor's expert "analyze[d] the standard market rate for such a loan." Pet. App. 18a. The Debtors' expert concluded that the "risk specific" rate would be over 12%, not the industry average of 6.8%, for this insolvent, debt-burdened company. Pet. App. 138a-39a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH *TILL*'S INSTRUCTION THAT THE DETERMINATION OF THE APPROPRIATE DISCOUNT RATE REQUIRES CONSIDERATION OF CHARACTERISTICS SPECIFIC TO THE DEBTOR AND TO THE LOAN.

In deciding that a cramdown interest rate of 6.785% was proper in this case, the bankruptcy court purported to follow the "coerced loan" theory as set forth in the Sixth Circuit's decisions in *In re Kidd* and *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427 (6th Cir. 1982), both of which applied the coerced loan theory in the context of Chapter 13

automobile loan cases. The coerced loan theory, as interpreted in *Kidd*, holds that, in arriving at a cramdown interest rate, the court must use "the current market rate of interest used for similar loans in the region," *Whitman*, 692 F.2d at 431, rather than a rate that reflects the individual risk characteristics of the reorganized debtor. *Kidd*, 315 F.3d at 677. *Kidd* applied the rate applicable to all vehicle loans in the geographic market rather than an individual market rate that would apply to Kidd, the reorganized debtor with a subprime used truck loan. *See Kidd*, 315 F.3d at 678 (cramdown calculation "does not entail an analysis of any particular debtor's credit rating"). The district court's affirmance also relied on *Kidd* and *Whitman*. Pet. App. 43a-45a.

After the district court issued its decision, and before the parties' briefs were filed in the Sixth Circuit, this Court issued its decision in *Till*, a Chapter 13 cramdown case.[7] The plurality opinion in *Till* rejected the coerced loan theory for calculating cramdown interest rates and held that the "formula" approach, in which a market-based, debtor specific risk premium is added to the prime lending rate to set the cramdown interest rate, is appropriate. *Till*, 541 U.S. at 478-80. Although there were 3 separate opinions in *Till*, eight of the nine justices agreed that the interest rate in the debtor's plan must include a market risk premium calculated on the individual risk profile of the reorganized debtor. *Id.* at 508 (Scalia, J., dissenting). Moreover, all nine justices agreed in

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[7] The *Till* plurality made reference to the application of the decision to Chapter 11 cases, noting that numerous lenders advertise financing for Chapter 11 debtors in possession and stating "when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." *Till*, 541 U.S. at 476 n.14.

Till that the individual debtor's risk of nonpayment is a factor to be taken into account in the analysis where, as in this case, the property to be distributed in the debtor's plan of reorganization is a note. *Id.* at 488-89 (Thomas, J., concurring), 508 (Scalia, J., dissenting).

Till requires the court to consider debtor-specific market risk factors in setting a cramdown interest rate, and reversal of the bankruptcy court's interest rate ruling is required because the coerced loan theory as set forth in *Whitman* and *Kidd* precluded consideration of those factors. The court of appeals rejected this argument, holding that "we decline to blindly adopt *Till*'s endorsement of the formula approach for Chapter 13 cases in the Chapter 11 context." Pet. App. 16a. The court of appeals affirmed the bankruptcy court's ruling on the basis that the bankruptcy court had "in fact sought to determine what an efficient market would have produced for the loan that the lenders provided, albeit under the rubric of the coerced loan theory." Pet. App. 18a. This is not what *Till* mandates.

The court of appeals' holding cannot be reconciled with the record in this case. The bankruptcy court specifically refused to consider loan-specific evidence in reaching its cramdown rulings. Pet. App. 117a ("While it may be true that a market exists, just as it was true that a subprime lender market existed in *Kidd*, the court is to consider 'more generally applicable rates' and not loan-specific rates.")); Pet. App. 107a ("The Lenders' argument is not a new one, but is novel in the sense that they argue that a market does exist to provide this debtor with a new loan, and therefore any application of a 'coerced loan theory' to reach a contrived rate is inappropriate, and inconsistent with the law.")).

The choice by the lower courts in this case of a contrived rate instead of a market rate of return constitutes reversible error. Reversal is required because the court of appeals' decision fails to follow the rationale adopted by all nine justices in *Till* that consideration of the individual debtor's risk of nonpayment[8] is controlling where the property to be distributed in the debtor's plan of reorganization is a note.

Although *Till* was a Chapter 13 case, the plurality in that case noted that the Bankruptcy Code contains several present-value provisions[9] and that it is "likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions." *Till*, 541 U.S. at 474 (plurality opinion).

II. THE LOWER COURTS ARE UNCERTAIN AS TO WHETHER AND HOW *TILL* APPLIES TO CHAPTER 11 REORGANIZATIONS.

The issue before the Court in *Till v. SCS Credit Corp.* was which method bankruptcy courts should use to determine the discount rate in Chapter 13 cram downs. 541 U.S. at 469 (plurality opinion). The Court's opinions considered five possible approaches: coerced loan, presumptive contract rate,

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[8] Compare *Kidd*, 315 F.3d at 678 (application of rate predicated on the average risk for all borrowers, *i.e.*, "current conventional market rate used for similar loans in the region").

[9] *See, e.g.*, 11 U.S.C. §§1129(a)(7)(A)(ii), 1129(a)(7)(B), 1129(a)(9)(B)(i), 1129(a)(9)(C), 1129(b)(2)(A)(i)(II), 1129(b)(2)(B), 1129(b)(2)(C)(i), 1173(a)(2), 1225(a)(4), 1225(a)(5)(B)(ii), 1225(b)(1), 1228(b)(2), 1325(a)(4), 1325(a)(5)(B)(ii), 1325(b)(1)(A).

cost of funds, formula, and risk-free. The plurality opinion, representing the views of four justices, rejected the coerced loan, presumptive contract rate, cost of funds, and risk-free approaches. *Id.* at 477, 483 (plurality opinion). The plurality instead approved the formula rate, under which the bankruptcy court starts with the national prime rate and adjusts it in light of the specific circumstances of the estate, the security, and the reorganization plan. *Id.* at 478-79 (plurality opinion). The plurality did not indicate whether its analysis would apply in the Chapter 11 context. However, the plurality noted that Congress likely "intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under" the present-value provisions in Chapters 11, 12, and 13. *Id.* at 474 (plurality opinion). Despite this statement, the plurality suggested in a footnote that the Chapter 11 context might be distinguishable. *See id.* at 476 n.14 (plurality opinion).

Specifically, the plurality noted that, although there is no market of willing cram down lenders in the Chapter 13 context, "numerous lenders advertise financing for Chapter 11 debtors in possession." *Id.* Based on this observation, the plurality stated that "when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." *Id.* What is not clear from the plurality decision is whether, given an efficient market as shown in this case, a bankruptcy court should incorporate the evidence from the market into the formula approach, one of the other four approaches in *Till*, or some other approach that *Till* did not consider. Thus, even the plurality opinion in *Till* does not provide a clear answer to what should be done in the Chapter 11 context.

Further complicating the question of how *Till* applies in the Chapter 11 context is uncertainty as to whether *Till*

actually produced a holding in the Chapter 13 context. Justice Thomas concurred in the judgment in *Till*, and the four remaining justices dissented. Justice Thomas interpreted 11 U.S.C. §1325(a)(5)(B)(ii) as not entitling a creditor to any adjustment for risk over the risk-free rate. *Till*, 541 U.S. at 486 (Thomas, J, concurring). Therefore, although he agreed with the plurality that the creditor was not entitled to the presumptive contract rate, he approved of the discount rate in the debtor's proposed reorganization plan, not because the rate was proper under the formula approach, but because the rate gave the creditor more than the risk-free rate to which it was entitled. *Id.* at 491 (Thomas, J, concurring).[10]

Since no opinion in *Till* garnered the support of five or more Justices, the question arises whether *Till* has a holding that is binding precedent. The Court has explained that "'[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)) (alteration in the original).

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[10] It should be noted that the statute at issue in this Chapter 11 case, 11 U.S.C. §1129(b), does not use the word "interest." Rather, the term used is "deferred cash payments." *See* 11 U.S.C. §1129(b)(2)(A)(i)(II) ("that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property"). These deferred cash payments may represent payments on secured debt, payment on subordinated debt and equity equivalent risk.

As the court of appeals noted, the lower courts are not consistent in their analyses of the question. The court of appeals cited lower court decisions reaching opposite results. Pet. App. 15a-16a, *citing Official Unsecured Creditor's Comm. of LWD, Inc. v. K&B Capital, LLC (In re LWD, Inc.)*, 332 B.R. 543, 556 (Bankr. W.D. Ky. 2005) (*Till* applies in Chapter 11), *aff'd*, No. Civ. A. 505CV-108-R, 2006 WL 709479 (W.D. Ky. Mar. 15, 2006); *In re Prussia Assocs.*, 322 B.R. 572, 585, 589 (Bankr. E.D. Pa. 2005) (holding that "*Till* is instructive, but it is not controlling, insofar as mandating the use of the 'formula' approach described in *Till* in every Chapter 11 case," and noting that "[*Till*'s] dicta implies that the Bankruptcy Court in such circumstances (*i.e.*, efficient markets) should exercise discretion in evaluating an appropriate cramdown interest rate by considering the availability of market financing")).

Outside commentators have also reached contradictory conclusions. *See* 7 ALAN N. RESNICK ET AL., COLLIER ON BANKRUPTCY, 15TH EDITION REVISED ¶ 1129.06[1][c][i] (2005)("[T]he relevant market for involuntary loans in chapter 11 may be just as illusory as in chapter 13."); Ronald F. Greenspan & Cynthia Nelson, *'Un*Till*' We Meet Again: Why the* Till *Decision Might Not Be the Last Word on Cramdown Interest Rates*, AM. BANKR. INST. J., Dec.-Jan. 2004, at 48 ("So we are left to wonder if footnote 14 nullifies *Till* in a chapter 11 context (or at least where efficient markets exist), modifies its application or is merely an irrelevant musing."); Thomas J. Yerbich, *How Do You Count the Votes—or Did* Till *Tilt the Game?*, AM. BANKR. INST. J., July-Aug. 2004, at 10 ("There is no more of a 'free market of willing cramdown lenders' in a chapter 11 (or a chapter 12, for that matter) than in a chapter 13."); Ralph Brubaker, *Cramdown Interest Rates: Disarray Dominates* Till . . . *?*, 24 BANKR. L. LETTER No. 8, Aug. 2004, at 1 ("The most

guidance that lower courts can glean from *Till* is that certain methodologies were rejected . . . by a majority of the Court. Within the realm of remaining contenders, though, there is little in *Till* to guide and constrain the lower courts, aside from pre-*Till* circuit precedent not inconsistent with *Till*."), at 7 ("[W]hen it comes to choosing among the competing approaches to determining a cramdown interest rate (presumably the impetus for the Court's grant of certiorari), *Till* does absolutely nothing . . . . *Till* introduces even more conceptual ambiguity into the inquiry."), at 9 ("The *Till* Court's failure to specify a methodology for determining the appropriate interest rate means that (depending on existing circuit precedent) not only are both a formula rate and a presumptive contract rate still viable, so too is a coerced loan approach."); April E. Kight, Recent Development, *Balancing the* Till*: Finding the Appropriate Cram Down Rate in Bankruptcy Reorganizations After* Till v. SCS Credit Corporation, 83 N.C. L. REV. 1015, 1016, 1027 (2005) ("[T]he *Till* decision produced no clear holding to bind lower courts . . . . [T]he fragmented decision in *Till* produced no 'law of the land because no one standard commanded the support of a majority of the Supreme Court.'"), *quoting United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003).

III. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER THE DETERMINATION OF THE APPROPRIATE DISCOUNT RATE REQUIRES CONSIDERATION OF CHARACTERISTICS SPECIFIC TO THE DEBTOR.

In applying §1129(b)(2)(A)(i)(II) and other present-value provisions from 11 U.S.C. §1129, the Fifth, Eighth, Ninth, and Eleventh Circuits have held that the determination of the appropriate discount rate requires consideration of characteristics specific to the debtor. In *Financial Security*

Assurance Inc. v. T-H New Orleans Limited Partnership (In re T-H New Orleans Limited Partnership), the Fifth Circuit affirmed the bankruptcy court's determination of the appropriate discount rate under 11 U.S.C. §1129(b)(2)(A)(i)(II) because it "reflect[ed] the present value of [the creditor]'s claim and account[ed] for the specific level of risk in th[e] case." 116 F.3d 790, 801 (5th Cir. 1997) (discount rate of 11.5% or 1.7 times risk-free rate).

The courts of appeals have followed the same approach in cases involving unsecured tax claims under 11 U.S.C. §1129(a)(9)(C).[11] In *Mississippi State Tax Commission v. Lambert (In re Lambert)*, the Fifth Circuit held that "[i]t is . . . the debtor's characteristics, e.g., the quality of the debtor's security and the risk of default, that determine the interest rate under 11 U.S.C. § 1129(a)(9)(C)." 194 F.3d 679, 684 (5th Cir. 1999) (citation omitted). The Eighth Circuit, in *United States v. Neal Pharmacal Company*, cautioned against the use of the rate provided for by 26 U.S.C. §6621 as the discount rate because that rate "ignores variations between the length of the payment period, the quality of the security, if any, and the risk of default." 789 F.2d 1283, 1288 (8th Cir. 1986) (citations omitted). The court went on to note that

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[11] Section 1129(a)(9)(C) provides that

> with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

11 U.S.C. §1129(a)(9)(C).

> although some courts have suggested that the risk of nonpayment is minimal in the case of a reorganizing debtor because the bankruptcy court may not confirm a reorganization plan without first finding that the plan is feasible, the risk of default for a reorganizing debtor may be at least as great as that of a nonreorganizing corporate debtor of comparable size and structure. Courts must therefore consider the risk that the debtor will not be able to complete the reorganization in determining the prevailing market rate on deferred payments of federal tax claims.

Id. (citations omitted). Likewise, in *United States v. Southern States Motor Inns, Inc. (In re Southern States Motor Inns, Inc.)*, the Eleventh Circuit reversed the lower courts' use of the §6621 rate, noting that the §6621 rate "ignores variations between the length of the payout period, the quality of the security, and the risk of subsequent default." 709 F.2d 647, 652 (11th Cir. 1983). The court observed that although

> [t]he variations between the length of payout period, quality of security, and risk of default under § 1129(a)(9)(C) may be relatively small because that section only deals with unsecured loans which must be paid within a six-year period[,] . . . the potential variations are not so insignificant that a single interest rate would be appropriate for all situations.

Id. at n.6. The Ninth Circuit, in *United States v. Camino Real Landscape Maintenance Contractors, Inc. (In re Camino Real Landscape Maintenance Contractors, Inc.)*, rejected the Government's argument that the §6621 rate should apply, noting that "[t]he debtor's characteristics determine the interest rate." 818 F.2d 1503, 1506 (9th Cir. 1987).

Four of these decisions have directly or indirectly quoted with approval the following statement from *Collier on Bankruptcy*:

> [T]he appropriate discount rate must be determined on the basis of the rate of interest which is reasonable in light of the risks involved. Thus, in determining the discount rate, the court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration of the quality of the security and the risk of subsequent default.

7 ALAN N. RESNICK ET AL., COLLIER ON BANKRUPTCY, 15TH EDITION REVISED ¶ 1129.06[1][c][ii][B] (2005); *see In re Lambert*, 194 F.3d at 681 (quoting *In re Camino Real Landscape Maint. Contractors, Inc.*, 818 F.2d at 1505 (quoting 1987 ed.)); *Neal Pharmacal Co.*, 789 F.2d at 1285 (quoting *Prudential Ins. Co. of Am. v. Monnier (In re Monnier Bros.)*, 755 F.2d 1336, 1339 (8th Cir. 1985) (quoting *Collier* without identifying edition)); *In re S. States Motor Inns, Inc.*, 709 F.2d at 651 (quoting 1982 ed.); *cf. Farm Credit Bank of Spokane v. Fowler (In re Fowler)*, 903 F.2d 694, 697 (9th Cir. 1990) (quoting 1989 ed. in 11 U.S.C. §1225(a)(5)(B)[12] context) (reversing bankruptcy court's

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[12] Section 1225(a)(5) provides, in pertinent part:

> with respect to each allowed secured claim provided for by the plan—
>
> * * *
>
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and
> (ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the

determination of the discount rate because of "insufficient findings as to the risks associated with Fowler's reorganization plan and the nature of the collateral securing the debts"); *United States v. Doud*, 869 F.2d 1144, 1146 (8th Cir. 1989) (quoting *In re Monnier*, 755 F.2d at 1339 (quoting *Collier* without identifying edition), in the 11 U.S.C. §1225(a)(5)(B) context).

Four courts of appeals have thus recognized that the determination of the appropriate discount rate for deferred cash payments under 11 U.S.C. §1129 requires consideration of the debtor's individual risk profile and the particular characteristics of the loan. The Sixth Circuit disagrees.

IV. IF *TILL* DOES NOT APPLY TO CHAPTER 11 REORGANIZATIONS, THE COURTS OF APPEALS REMAIN DIVIDED ON WHETHER THE DETERMINATION OF THE APPROPRIATE DISCOUNT RATE IN A CHAPTER 11 CASE REQUIRES CONSIDERATION OF CHARACTERISTICS SPECIFIC TO THE DEBTOR, AND THE COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS IN THIS CASE.

As noted previously, the *Till* plurality opinion rejected the coerced loan, presumptive contract rate, cost of funds, and risk-free approaches. *Till*, 541 U.S. at 477, 483 (plurality opinion). The plurality instead approved the formula rate approach, which requires consideration of the specific circumstances of the debtor's estate, the security, and the reorganization plan. *Id.* at 478-79 (plurality opinion).

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allowed amount of such claim . . . .

11 U.S.C. §1225(a)(5).

The plurality noted it was likely that Congress "intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under" the present-value provisions in Chapters 11, 12, and 13, *id.* at 474 (plurality opinion), while suggesting in a footnote that the Chapter 11 context might be distinguishable. *See id.* at 476 n.14 (plurality opinion).

If the Sixth Circuit's refusal to "blindly adopt *Till*'s endorsement of the formula approach for Chapter 13 cases in the Chapter 11 context," Pet. App. 16a, correctly asserts that *Till* does not apply in Chapter 11 cases, then a deep split among the circuits remains unresolved. *See In re Lambert*, 194 F.3d at 684 (coerced loan approach); *In re S. States Motor Inns, Inc.*, 709 F.2d at 651-53 (same); *In re Monnier Bros.*, 755 F.2d at 1339 (presumptive contract rate approach); *In re T-H New Orleans Ltd. P'ship*, 116 F.3d at 800 (same); *Travelers Ins. Co. v. Bryson Props., XVIII* (*In re Bryson Props., XVIII*), 961 F.2d 496, 500 (4th Cir. 1992)(formula approach); *In re Fowler*, 903 F.2d at 698 (same).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 03-6500/6501

[Filed February 1, 2006]

IN RE: AMERICAN HOMEPATIENT, INC., ET AL., Debtors.	)
BANK OF MONTREAL, ET AL., Appellants/Cross-Appellees,	)
v.	)
OFFICIAL COMMITTEE OF UNSECURED CREDITORS, ET AL., Appellees/Cross-Appellants.	)

BEFORE: CLAY, GILMAN, and COOK, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 03-6500/6501

[Filed August 16, 2005]

IN RE: AMERICAN HOMEPATIENT, INC., ET AL., Debtors.	)
BANK OF MONTREAL, ET AL., Appellants/Cross-Appellees,	)
v.	)
OFFICIAL COMMITTEE OF UNSECURED CREDITORS, ET AL., Appellees/Cross-Appellants.	)

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 03-00545
Thomas A. Wiseman, Jr., District Judge

BEFORE: CLAY, GILMAN, and COOK, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge. In July of 2002, American HomePatient, Inc. (American) filed for relief under Chapter 11 of the Bankruptcy Code. Despite objections by a group of secured lenders to American's proposed plan of reorganization, the bankruptcy court imposed the plan on the lenders pursuant to the Bankruptcy Code's so-called "cramdown" provisions set forth in 11 U.S.C. § 1129(b). The bankruptcy court further concluded that the appropriate cramdown interest rate for the lenders was 6.785%, and it fixed their collateral value at $250 million.

Displeased with these rulings, the lenders appealed the order of confirmation to the district court. American responded by filing a motion to dismiss the lenders' appeal on the grounds of equitable mootness. The district court denied American's motion, but then concluded on the merits that the bankruptcy court had properly determined both the cramdown interest rate and the collateral value. Both parties appealed. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

American is a publicly-held company based in Brentwood, Tennessee. It specializes in providing home healthcare services and products and has more than 280 affiliates and subsidiaries in 35 states. Over the course of its operations, American borrowed a significant amount of money. Most of this debt was incurred between 1994 and 1998, when American invested in dozens of new branch offices. The lenders in this case are 24 entities that loaned money to American during this time frame. Although the parties disagree as to the exact total owed to the lenders, both sides

acknowledge that the principal balance is in the range of $278 to $290 million.

Following American's voluntary filing for bankruptcy protection under Chapter 11 of the Bankruptcy Code in July of 2002, the company and its affiliates filed a Joint Plan of Reorganization. American filed a Second Amended Joint Plan of Reorganization in January of 2003. This amended plan was approved by all but the lenders in the present case. American then sought to have the plan confirmed pursuant to the Bankruptcy Code's cramdown provisions set forth in 11 U.S.C. § 1129(b), which allow a reorganization plan to go into effect notwithstanding the fact that it has not been accepted by all of the impaired classes.

The bankruptcy court held a five-day hearing on the lenders' claims. During this hearing, the court heard from various witnesses who testified as to the appropriate cramdown interest rate to be applied to the lenders' allowed secured claim. The bankruptcy court was ultimately persuaded by the testimony of American's expert witness David Rosen, who opined that the appropriate cramdown interest rate was 6.785%, which was equal to the interest rate on a six-year Treasury note plus 3.5%. It determined that the lenders' proposed interest rate of 12.16% was inappropriate because it would result in a windfall to the lenders.

The bankruptcy court also heard testimony regarding the lenders' collateral value in order to determine the amount of the lenders' allowed secured claim. Patrick Hurst, another of American's expert witnesses, testified that the value of this collateral was between $235 and $275 million. The lenders' expert witness, Gerald Benjamin, opined that the correct valuation was between $300 and $320 million. After weighing this conflicting evidence, the bankruptcy court found that

Hurst's testimony was significantly more credible. It then fixed the lenders' collateral value, and thus their allowed secured claim, at $ 250 million.

On May 14, 2003, the bankruptcy court overruled the lenders' objections and directed American to submit a proposed order confirming the amended reorganization plan. This confirmation order was entered by the bankruptcy court on May 27, 2003. The lenders subsequently appealed to the district court and petitioned first the bankruptcy court and then the district court for a stay of the confirmation order. This request was denied by both courts, and the lenders did not seek a stay from this court. As a result, the amended reorganization plan became effective on July 1, 2003.

On August 15, 2003, American filed a motion to dismiss the lenders' appeal before the district court on the basis of equitable mootness. The district court denied the motion, but affirmed the bankruptcy court's decision to confirm the plan on the merits. This appeal by the lenders and cross-appeal by American followed.

II. ANALYSIS

A. Standard of review

"In appeals from the decision of a district court on appeal from the bankruptcy court, the court of appeals independently reviews the bankruptcy court's decision, applying the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law." *Zirnhelt v. Madaj* (*In re Madaj*), 149 F.3d 467, 468 (6th Cir. 1998) (citations and quotation marks omitted). Furthermore, when a question in the bankruptcy context involves a mixed question of law and fact, "we must break it down into its constituent parts and apply the

appropriate standard of review for each part." *WesBanco Bank Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 106 F.3d 1255, 1259 (6th Cir. 1997) (citation and quotation marks omitted).

B. American's motion to dismiss on equitable mootness grounds

American argues in its cross-appeal that the lenders are equitably estopped from pursuing this appeal. In bankruptcy proceedings, a "case that is equitably moot is not technically moot, but rather equitable mootness occurs where the plan of reorganization is substantially consummated, and where it is no longer 'prudent to upset the plan of reorganization.'" *Guardian S&L Ass'n v. Arbors Assocs. Ltd. P'ship (In re Arbors Assocs. Ltd. P'ship)*, 1999 U.S. App. LEXIS 162, No. 97-2099, 1999 WL 17649, at *2 (6th Cir. Jan. 4, 1999) (unpublished) (citation omitted).

This court has yet to delineate with clarity the appropriate standard for addressing claims of equitable mootness. Generally, "when determining the mootness of an appeal of a bankruptcy reorganization order, this Court inquires as to whether the plan has been substantially consummated at the time of the appeal, and, if so, whether piecemeal modification of the bankruptcy reorganization plan is possible or desirable." *Unofficial Comm. of Co-defendants v. Eagle-Picher Indus. (In re Eagle Picher Indus.)*, 1998 U.S. App. LEXIS 31946, Nos. 96-4309 & 97-4260, 1998 WL 939869, at *4 (6th Cir. Dec. 21, 1998) (unpublished) (citation and quotation marks omitted). This court in *City of Covington v. Covington Landing Ltd. Partnership*, 71 F.3d 1221, 1225 (6th Cir. 1995), on the other hand, cited with approval two other formulations of the governing standard. One is employed by the Seventh Circuit, in which the reviewing court "asks

whether it is 'prudent to upset the plan of reorganization at this late date,'" *id.* (quoting *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994)), and the other is utilized by the Fifth Circuit, in which the court examines "(1) whether a stay has been obtained; (2) whether the plan has been 'substantially consummated'; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *Id.* (citing *Manges v. Seattle-First Nat'l Bank* (*In re Manges*), 29 F.3d 1034, 1039 (5th Cir. 1994)). The court in *City of Covington*, however, concluded that the record before it was inadequate to support equitable estoppel, 71 F.3d at 1226, so it "did not explicitly adopt a formula for this equitable doctrine." *Arbors of Houston Assocs. Ltd. P'ship*, 1999 U.S. App. LEXIS 162, 1999 WL 17649 at *2.

We are now squarely faced with the issue. After due consideration, we adopt the Fifth Circuit's standard quoted above, which we believe presents the clearest synthesis of the relevant factors. Under this standard, the first factor to consider is whether a stay has been obtained. The lenders concede that they did not pursue a stay of the confirmation order in this court. American argues that this fact establishes that "the Lenders assumed the risk that the Appeal would be equitably mooted." The lenders, for their part, argue that to pursue a stay before the Sixth Circuit would have been futile because of the high burden required for injunctive relief. From a strategic perspective, they argue, pursuing such a stay made little sense.

This court has in the past acknowledged that "[t]he failure to seek a stay . . . is not necessarily fatal to the appellant's ability to proceed." *City of Covington*, 71 F.3d at 1225-26; *see also In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir. 1994) ("Requesting a stay is not a mandatory step comparable to

filing a timely notice of appeal."). In sum, while this first factor weighs somewhat against the lenders, their failure to seek a stay before this court is not fatal.

The next factor to be considered is whether the plan has been substantially consummated. *City of Covington*, 71 F.3d at 1225. Again, the lenders have conceded that "the Plan is likely already consummated." This second factor thus weighs unequivocally against the lenders.

The last, and most important factor, is whether the relief requested would affect either the rights of parties not before the court or the success of the plan. *See id.* Here, the parties disagree. American argues that the lenders' appeal, if successful, will unravel the entire reorganization plan. But the lenders argue that "none of the actions undertaken with the consummation of the Plan needs to be reversed for this Court to grant the relief that the Lenders seek."

The bankruptcy court disagreed, commenting that

> [t]he Lenders do not quibble with the attainability of the financial projections of the debtor. Instead, they contend, that given the highly leveraged nature of the debtor's operations, and the $290,000,000 owed to the senior secured debt holders, that the debtor cannot generate enough cash to service the debt or pay down the principal. *On these financial projections, the Lenders are correct if it is assumed that the Lenders secured debt is $290,000,000 and the interest rate is to be paid in excess of 12%.* However, on the financial projections of the debtor in light of a $250,000,000 secured debt, at an approximately 6.85% interest rate, the debtor's plan is not only feasible, but reasonable.

(Emphasis added.) This comment indicates that the bankruptcy court was of the opinion that accepting both the *lenders' suggested collateral valuation and their* cramdown interest rate would result in an infeasible reorganization plan.

The problem, however, with finding this statement conclusive on the equitable mootness issue is that the bankruptcy court did not find that the lenders' claims taken individually would unravel the entire confirmed plan. Moreover, other observations made by the bankruptcy court arguably support the lenders' position. For example, when reviewing the lenders' claims about an investment-band cramdown interest rate, the bankruptcy court simply noted that "[a]n interest rate of 12.16% results in a windfall to the Lenders." It did not comment either way on the feasibility of such a proposal. Likewise, when addressing the lenders' collateral-valuation argument, the bankruptcy court found American's expert to be more persuasive and credible. But it again did not comment on the feasibility of adopting the lenders' higher valuation.

The lenders further observe that "[t]he Houlihan Lokey financial projections clearly show the ability to pay $290,000,000 at a 12.16% interest rate in deferred payments over time." This argument relies heavily on complex accounting procedures that strain the brain. Essentially, however, the lenders argue that American's objections to the proposal by the lenders are based on a static analysis of the debtor's revenue and obligations. The lenders, by contrast, maintain that taking into account future projections combined with an increasing interest rate would enable American to pay $290,000,000 at a 12.16% interest rate without thwarting the plan's other terms or affecting American's obligations to third parties. American, for its part, did not directly counter the complex accounting presented by the lenders. It suggests only

that accepting the lenders' position would unravel the entire confirmed reorganization plan.

In sum, although the lenders did not seek a stay before this court, and although the reorganization plan has been substantially consummated, the lenders have presented a plausible argument that American might be able to pay $290,000,000 at a 12.16% interest rate without affecting the success of the confirmed plan. We will therefore err on the side of caution and deny America's motion to dismiss the appeal on the grounds of equitable mootness. This brings us to the merits of the lenders' appeal.

C. The cramdown interest rate

The lenders' first substantive argument is that the district court erred in applying the "coerced loan theory" to determine the appropriate cramdown interest rate. They further contend that the cramdown interest rate of 6.785% is too low. Instead, they submit that the bankruptcy court should have applied a blended interest rate of 12.16%. This complex issue is further complicated by the recent Supreme Court case of *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004) (plurality opinion).

As an initial matter, a judicial cramdown is an available option when "one or more classes refuse to accept the plan." 7 Collier on Bankruptcy ¶ 1129.04 (15th ed. 2005). The cramdown provisions set forth in 11 U.S.C. § 1129(b) allow courts, despite objections, to confirm a reorganization plan if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." This statutory provision, however, does not specify how bankruptcy courts are to calculate the appropriate cramdown

interest rate for lenders. *Cf. Till*, 541 U.S. at 473 ("[Chapter 13] provides little guidance as to which of the rates of interest . . . Congress had in mind when it adopted the cram down provision.").

In its pre-*Till* assessment, the bankruptcy court relied on several Sixth Circuit cases calling for the application of the coerced loan theory in determining cramdown interest rates. *See Household Auto. Fin. Corp. v. Burden* (*In re Kidd*), 315 F.3d 671 (6th Cir. 2003) (applying the coerced loan theory in a Chapter 13 context); *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427 (6th Cir. 1982) (same). Under the coerced loan theory, courts "treat any deferred payment of an obligation under a plan as a coerced loan and the rate of return with respect to such loan must correspond to the rate that would be charged or obtained by the creditor making a loan to a third party with similar terms, duration, collateral and risk." 7 Collier on Bankruptcy ¶ 1129.06[1][c][ii][B]. Courts must therefore "use the current market rate of interest used for similar loans in the region." *Memphis Bank & Trust Co.*, 692 F.2d at 431. This court has concluded that "[b]ankruptcy courts are generally familiar with the current conventional rates on various types of consumer loans. And where parties dispute the question, proof can easily be adduced." *Id.*

The bankruptcy court therefore proceeded to determine, "based on its assessment of the credibility and reliability of the expert witnesses, what best accomplishes the market rate under the . . . coerced loan theory." In this analysis, it was most persuaded by David Rosen, one of American's expert witnesses. Rosen testified that, "under the 'coerced loan' theory, the appropriate level of interest to provide the Lenders with the present value of their claim is the six-year Treasury Bill [interest rate] plus 350 basis points." This resulted in the

appropriate interest rate under the coerced loan theory being fixed by the bankruptcy court at 6.785% per annum.

The lenders, however, contend that application of the coerced loan theory was improper in light of *Till*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787. In that Chapter 13 case, the Supreme Court evaluated the four widely used methods of calculating the cramdown interest rate (the coerced loan, presumptive contract rate, formula rate, and cost of funds approaches) and found that all but the formula rate suffered from serious flaws:

> These considerations lead us to reject the coerced loan, presumptive contract rate, and cost of funds approaches. Each of these approaches is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value. For example, the coerced loan approach requires bankruptcy courts to consider evidence about the market for comparable loans to similar (though nonbankrupt) debtors--an inquiry far removed from such courts' usual task of evaluating debtors' financial circumstances and the feasibility of their debt adjustment plans. In addition, the approach overcompensates creditors because the market lending rate must be high enough to cover factors, like lenders' transaction costs and overall profits, that are no longer relevant in the context of court-administered and court-supervised cram down loans.

Id. at 477.

Instead, the Court endorsed the use of the formula approach. Under this approach, the bankruptcy court

> begins by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly.

Id. at 478-79. The Court further observed that adopting "the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings." *Id.* at 479.

Till, however, was a Chapter 13 bankruptcy case. So even though the plurality is clear that the formula approach is the preferable method for Chapter 13 cases, the opinion is less clear about cases in the Chapter 11 context. On the one hand, the plurality noted that "the Bankruptcy Code includes numerous provisions that, like the [Chapter 13] cram down provision, require a court to 'discoun[t] . . .[a] stream of deferred payments back to the[ir] present dollar value' to ensure that a creditor receives at least the value of its claim." *Id.* at 474 (quoting *Rake v. Wade*, 508 U.S. 464, 472 n.8, 124 L. Ed. 2d 424, 113 S. Ct. 2187 (1993)) (alterations in original). It further commented that "[w]e think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions." *Id.* Some commentators have taken this to mean that *Till*'s analysis of Chapter 13 cramdown interest rates might be applicable to Chapter 11 cramdowns as well. *See* 7 Collier on Bankruptcy ¶ 1129.06[1][c][i].

In a footnote, however, the plurality noted that "there is no readily apparent Chapter 13 'cram down market rate of interest.'" *Id.* at 476 n.14. This follows from the fact that "[b]ecause every cram down loan is imposed by a court over the objection of the secured creditor, there is no free market of willing cram down lenders." *Id.* But

> [i]nterestingly, the same is not true in the Chapter 11 context, as numerous lenders advertise financing for Chapter 11 debtors in possession. *Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce.* In the Chapter 13 context, by contrast, the absence of any such market obligates courts to look to first principles and ask only what rate will fairly compensate a creditor for its exposure.

Id. (emphasis added). This footnote suggests that a formula approach like the one adopted by the plurality is not required in the Chapter 11 context.

At least one court that has examined cramdown interest rates post-*Till* has concluded that *Till* does not apply in a Chapter 11 context. *See In re Prussia Assocs.*, 322 B.R. 572, 585, 589 (Bankr.E.D. Pa. 2005) (holding that "*Till* is instructive, but it is not controlling, insofar as mandating the use of the 'formula' approach described in *Till* in every Chapter 11 case," and noting that "[*Till*'s]dicta implies that the Bankruptcy Court in such circumstances (i.e., efficient markets) should exercise discretion in evaluating an appropriate cramdown interest rate by considering the availability of market financing").

Several outside commentators, however, have argued that *Till*'s formula approach should apply to Chapter 11 cases as

well as to Chapter 13 cases, noting that the two are not all that dissimilar. *See* 7 Collier on Bankruptcy ¶ 1129.06[1][c][i] ("[T]he relevant market for involuntary loans in chapter 11 may be just as illusory as in chapter 13."); Ronald F. Greenspan & Cynthia Nelson, *'Un*Till *' We Meet Again: Why the* Till *Decision Might Not Be the Last Word on CramdownInterest Rates*, Am. Bankr. Inst. J., Dec.-Jan. 2004, at 48 ("So we are left to wonder if footnote 14 nullifies *Till* in a chapter 11 context (or at least where efficient markets exist), modifies its application or is merely an irrelevant musing."); Thomas J. Yerbich, *How Do You Count the Votes--or Did* Till *Tilt the Game?*, Am. Bankr. Inst. J., July-Aug. 2004, at 10 ("There is no more of a 'free market of willing cramdown lenders' in a chapter 11 (or a chapter 12, for that matter) than in a chapter 13."). And at least one court has concluded that *Till* does apply in a Chapter 11 context.*See Official Unsecured Creditor's Comm. of LWD, Inc. v. K&B Capital, LLC (In re LWD, Inc.)*, 332 B.R. 543, 2005 Bankr. LEXIS 384, 2005 WL 567460 (Bankr. W.D. Ky. Feb. 10, 2005).

Taking all of this into account, we decline to blindly adopt *Till*'s endorsement of the formula approach for Chapter 13 cases in the Chapter 11 context. Rather, we opt to take our cue from Footnote 14 of the opinion, which offered the guiding principle that "when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." *Till*, 541 U.S. at 476 n.14. This means that the market rate should be applied in Chapter 11 cases where there exists an efficient market. But where no efficient market exists for a Chapter 11 debtor, then the bankruptcy court should employ the formula approach endorsed by the *Till* plurality. This nuanced approach should obviate the concern of commentators who argue that, even in

the Chapter 11 context, there are instances where no efficient market exists.

While we accept Footnote 14's recommendation that the appropriate rate here is the one that "an efficient market would produce," we must still reconcile this principle with the coerced loan theory employed by the bankruptcy court. Indeed, the lenders make two related arguments against the bankruptcy court's determination of the appropriate interest rate, which they contend demonstrate that the court did not apply the rate that an efficient market would produce. They first claim that the 6.785% rate fixed by the bankruptcy court is not a realistic measure of what an efficient market would provide. According to the lenders' experts, an efficient market would have produced a rate of approximately 12%. One of their experts opined that this is because

> [i]t is not feasible, using conventional funding sources, to provide the $309 million in financing needed by the Company with 100% debt. There is, however, an established market that can provide financing of $309 million to the Company. This market would provide a combination of senior debt, mezzanine debt, and equity, with resulting yields priced in response to the inherent risks assumed by the holders of such instruments.

This dovetails with the lenders' second point of contention, which is that the bankruptcy court should have taken "loan-specific" criteria into account when adjusting the appropriate cramdown rate. In support of this argument, they cite to language in *Till* suggesting that the Supreme Court would look favorably on an analysis incorporating debtor-specific risks.

Our understanding of the bankruptcy court's methodology, however, is that it in fact sought to determine what an efficient market would have produced for the loan that the lenders provided, albeit under the rubric of the coerced loan theory. In its assessment of the coerced loan theory, the bankruptcy court court accepted Rosen's testimony to the effect that the loan in question was "senior debt loan in the health care field . . . under a normalized capital structure." Rosen then proceeded to analyze the standard market rate for such a loan. The lenders' argument, on the other hand, is centered on the composite interest rate that a new loan (including "mezzanine" debt and equity) would command in the market, not what their loan to American (which was all senior debt) would require. But as the bankruptcy court properly noted:

> The Lenders' argument that the debtor could not obtain a "new loan" in the market place so highly leveraged might be so, but in actuality no new loan is being made here at all. Instead, the court is sanctioning the workout between the debtor and the Lenders. New funds are not being advanced without the consent of the claimants.

Indeed, the only type of debt contemplated by American's reorganization plan was senior secured debt. The inclusion of other types of financing—mezzanine debt and equity—is a pure hypothetical suggested by the lenders.

In addition, the bankruptcy court commented that, in its opinion, the 12.16% interest rate called for by the lenders would result in a "windfall." The court observed that

> [t]he lenders are not entitled to a premium on their return because the debtor filed for bankruptcy. The

> blended rate suggested by the Lenders goes beyond protecting the value of its claim from dilution caused by the delay in payment . . . . Any windfall because of bankruptcy is neither contemplated nor required under the Code. The court's role is not to reward the creditor for the "new loan" to a bankrupt debtor, but instead only to provide the creditor with the present value of its claim.

This observation, that the lenders' request would result in a windfall, is further highlighted by *Till*. In *Till*, the plurality acknowledged that lenders ought to be compensated for their risk. The opinion, however, cited with approval the fact that other courts starting from the prime rate "have generally approved adjustments of 1% to 3%." *Till*, 541 U.S. at 480. It also commented that if a bankruptcy court "determines that the likelihood of default is so high as to necessitate an 'eye-popping' interest rate, the plan probably should not be confirmed." *Id.* at 480-81 (citation omitted). The interest rate demanded by the lenders here—12.16%—is nearly eight percentage points higher than the 4.25% prime rate in effect on May 27, 2003, the date that the confirmation order was entered by the district court. *See* http://www.federalreserve.gov/releases/h15/data/d/prime.txt. As such, the 12.16% rate appears to fall under the "eye-popping" category described unfavorably by *Till*.

In sum, *Till* provides the lower courts with the guiding principle that "when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." *Till*, 541 U.S. at 476 n.14. Although the lenders argue that the rate chosen by the bankruptcy court was not the rate produced by an efficient market, this is a question that was fully considered by that court. Its conclusion that the appropriate market rate would be

6.785% was reached only after carefully evaluating the testimony of various expert witnesses. The fact that the bankruptcy court utilized the rubric of the "coerced loan theory" that was criticized in *Till* provides no basis to reverse the bankruptcy court's decision because *Till* pointed out that, if anything, the coerced loan theory "*overcompensates* creditors . . . ." *Till*, 542 U.S. at 477 (emphasis added). We therefore concur in the result reached by both the bankruptcy court and the district court on this issue.

D. The lenders' collateral value

The lenders' final argument is that the bankruptcy court erred in determining the collateral value of their secured interest in American's assets. Specifically, the lenders assert that the witness upon whom the bankruptcy court relied, Patrick Hurst, "testified to the 'enterprise value' of the Debtors, but he did not testify that the Lenders' collateral value was the same thing as the enterprise value." They further claim that his evaluation did not take into account American's current liabilities or excess cash reserves.

There are two weaknesses with the lenders' argument. First, they maintain that the failure to include current liabilities in calculating American's enterprise value constitutes an error as a matter of law. But they fail to cite any caselaw or authority supporting the proposition that current liabilities must, as a matter of law, be added to the enterprise value in order for that value to be the appropriate collateral value in a cramdown proceeding. In the absence of any authority to the contrary, we believe that the appropriate valuation should be viewed as a question of fact rather than a question of law.

That the valuation of the lenders' collateral is a question of fact is bolstered by the extensive "number crunching" performed by the bankruptcy court. In the course of the confirmation proceedings, the court perused hundreds of pages of supporting documents and heard two expert witnesses, Hurst and Benjamin, testify at length about the appropriate valuation. It also examined the results based upon three different valuation methodologies discussed by the two experts. The bankruptcy court had thus considered an extensive factual record by the time it fixed the lenders' collateral value at $250 million.

Second, the record indicates that Hurst did in fact take current liabilities and excess cash into account when calculating American's enterprise value. At one point during the confirmation hearing, Hurst was explicitly asked if he had included these items in his enterprise valuation:

> Q. And [with regard to the] selected enterprise value, you said you've added the excess cash to get to a final enterprise value?
> A. Correct.
> Q. Okay. Let's see. In calculating your enterprise value, have you assumed that a purchaser would assume the current liabilities?
> A. Yes.
> Q. And why is that?
> A. Because when we talked about it before—remember at the very beginning we said that the business enterprise valuation assumes that a buyer (inaudible) insufficient level of working capital. Working capital is current assets minus current liabilities. And so, therefore, they're getting all the assets and they're getting the current liabilities.

Hurst's calculations therefore did take these items into account. So even accepting the lenders' argument that the bankruptcy court was legally required to take into account excess cash and current liabilities in the overall valuation, the court's reliance on Hurst's testimony establishes that it did exactly that.

The lenders' argument essentially calls on this court to recalculate the collateral value of their claim on the basis of the testimony and documents already thoroughly reviewed by the bankruptcy court. We decline to do so because we find no error, much less clear error, in the bankruptcy court's evaluation of the lenders' collateral value.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:03-0545
Bankruptcy Case No. 302-08915

[Filed September 12, 2003]

BANK OF MONTREAL, et. al. Appellant,	)
v.	)
AMERICAN HOMEPATIENT, INC., et. al., Appellee.	)
IN RE: AMERICAN HOMEPATIENT, INC., at. el.	)

ORDER

Before the Court are two matters. For the reasons more fully discussed in the attached memorandum, this Court DENIES the Motion to Dismiss as Equitably Moot (Doc. No. 36). Additionally, upon consideration of the direct appeal from the bankruptcy court, the Court AFFIRMS the decision of the bankruptcy court confirming the Plan.

It is so ORDERED.

/s/ _____
Thomas A. Wiseman, Jr.
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:03-0545
Bankruptcy Case No. 302-08915

[Filed September 12, 2003]

BANK OF MONTREAL, et. al.	)
Appellant,	)
	)
v.	)
	)
AMERICAN HOMEPATIENT, INC., et. al.,	)
Appellee.	)
	)
IN RE: AMERICAN HOMEPATIENT, INC., at. el.	)
	)

MEMORANDUM

Before the Court are two matters. For the reasons more fully discussed below, this Court DENIES the Motion to Dismiss as Equitably Moot (Doc. No. 36). Additionally, upon consideration of the direct appeal from the bankruptcy court, the Court AFFIRMS the decision of the bankruptcy court confirming the Plan.

I. Facts

The parties stipulated to the following background information at the confirmation hearing and it was

summarized by the bankruptcy court in the Memorandum dated May 15, 2003:

1. On July 31, 2002, the Debtors filed voluntary petitions for relief under Chapter 11, Title 11, United States Code in the United States Bankruptcy Court for the Middle District of Tennessee. Pursuant to 11 U.S.C. §§ 1107(a) and 1108, the Debtors are operating their businesses and managing their property as Debtors-in-Possession.

2. No trustee or examiner has been appointed. One official committee of unsecured creditors has been established. One official committee of equity security holders has been established.

3. The Confirmation Hearing was a core proceeding over which the bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 157(L) and 1334(b). Venue was appropriate pursuant to 28 U.S.C. §§ 1408 and 1409.

4. Debtor American HomePatient, Inc., a Delaware corporation, through its subsidiaries and affiliates has over 285 retail business locations in 35 states. The Companies' corporate offices and headquarters are located in Brentwood, Tennessee. The stock of American HomePatient, Inc. is publicly-traded in the OTC market. American HomePatient, Inc. has in excess of 1,250 shareholders.

5. As of March 7, 2003, the Companies had approximately 3,458 employees.

6. The Companies are engaged in the business of providing home health care services and products, consisting primarily of respiratory and infusion therapies and the

rental and sale of home medical equipment and home health care supplies. Most of these products and services are provided directly to the Companies' customers in their homes. As of December 31, 2002, the Companies had approximately 300,000 customers.

7. For the year ending December 31, 2002, home respiratory services, home infusion services and home medical equipment and supplies represented 66%, 14%, and 20% of the revenues, respectively. Home respiratory services include oxygen systems, nebulizers, aerosol medications and home ventilators and are provided primarily to patients with severe and chronic pulmonary diseases. Home infusion services are used to administer nutrients, antibiotics, and other medications to patients with medical conditions such as neurological impairments, infections diseases or cancer. The Companies also sell and rent a variety of home medical equipment and supplies, including wheelchairs, hospital beds and ambulatory aids.

8. The services and products provided by the Companies are paid for primarily by Medicare, Medicaid and other third-party payers on a fee-for-service basis. The Companies operate approximately 22 billing centers whose primary function is to bill and collect for the services rendered and products sold through the Companies' retail centers.

9. All of the Companies' employees are employed by American HomePatient of Tennessee, Inc. The Companies' cash collections are deposited into separate accounts maintained for each branch. Thereafter the cash is concentrated in American HomePatient, Inc., which in turn pays all amounts due to the Companies' creditors.

10. The Secured Lenders' credit agreement was drafted naming only American HomePatient, Inc. as obliger and all other entities as guarantors. The Secured Lenders claim liens in all or substantially all of the assets of the Companies, including a pledge of the stock of each Debtor other than American HomePatient, Inc.

11. On July 31, 2002, simultaneous with the filing of their voluntary petitions, the Debtors filed a joint Plan of Reorganization. On January 2, 2003, the Debtors filed their Second Amended Joint Plan of Reorganization Proposed by the Debtors and The Official Unsecured Creditors Committee and Disclosure Statement for the Second Amended Plan. The bankruptcy court entered an order on February 26, 2003 approving the Debtors' Disclosure Statement subject to certain modifications agreed on by the Parties. On February 26, 2003, the Debtors filed their First Amended Disclosure Statement for the Second Amended Plan.

12. The Debtors mailed copies of the Second Amended Plan, the First Amended Disclosure Statement, the Disclosure Statement Order and a Ballot to all creditors. Said mailing was in compliance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. The Debtors' tabulation agent, Wachovia Information Consulting Group, properly counted and tabulated all ballots received. Solicitation in connection with the Second Amended Plan was appropriate and the protection afforded by 11 U.S.C. § 1125(e) would apply to such solicitation.

13. The Plan provides that all equity holders shall retain their equity position in American HomePatient, Inc., and the Companies shall continue operation.

14. Impaired classes 1,3,4,7, and 8 voted to accept the Plan. Excluding the ballots cast by the Agent and the Secured Lenders, of the in excess of one thousand (1000) ballots received, five (5) were rejections.

15. The Secured Lenders asserted a claim against the Debtors as of the Petition Date in the aggregate principal amount of $275,354.88 plus letter of credit obligations of $3,350,000 plus other amounts set out in the proofs of claim filed by the Secured Lenders.

16. Each of the 24 Secured Lenders separately filed a proof of claim in the separate bankruptcy case for each Debtor. The 24 Secured Lenders filed approximately 600 proofs of claim against the 25 Debtors.

17. As of April 16, 2002, the Agent's records reflect that the total amount owed to the Secured Lenders is approximately $288,000,000.00, consisting of the principal balance of $275,395,354.88, funded letters of credits of $3,310,000.00, accrued interest fees and cost of collection (through March 31, 2003) of approximately $20,670,977.07, less adequate protection payments of $12,795,414.49. The Agent projects this amount to increase approximately $290,000,000.00 by June 30, 2003, the proposed Effective Date of the Plan. For purposes of the Confirmation Hearing only, the Debtors do not dispute amounts claimed to be owed to the Secured Lenders consisting of principal amounts and amounts that were funded for letters of credit.

18. Each of the 24 Secured Lenders cast ballots rejecting the Plan using the form supplied by the Debtors. In addition, each of the 24 Secured Lenders submitted a separate ballot in each of the 25 cases for each Debtor rejecting the

Plan. The Ballots submitted labeled with the names of each Debtor separately are not included in the Ballot Tabulation results. No other creditor cast a ballot in the name of any separate Debtor.

19. The Agent filed an objection to confirmation of the Plan.

20. According to the records of the Agent, the entities listed on the schedule were the lenders and issuers of letters of credit relevant to this matter in the principal amounts set forth on the schedule as of April 21, 2003.

II. Pending Motions

A. Motion to Dismiss Appeal as Equitably Moot

As a preliminary matter, the Debtor claims that the Lenders are equitably estopped from pursuing their direct appeal. "A bankruptcy case that is equitably moot is not technically moot, but rather equitable mootness occurs where the plan of reorganization is substantially consummated, and where it is not longer 'prudent to upset the plan of reorganization.'" *In re Arbors of Houston Associates Limited Partnership,* 172 F.3d 47 (6th Cir. Jan. 4, 1999)(unpublished); *see City of Covington v. Covington Landing Ltd. Partnership,* 71 F. 3d 1221, 1225 (6th Cir. 1995). When considering whether to dismiss a bankruptcy appeal as equitably moot, the Sixth Circuit considers three factors: (1) whether a stay pending appeal was obtained; (2) whether there has been substantial confirmation of the plan; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. *See City of Covington v. Covington Landing Ltd.*, 71 F.3d at 1225 (citing to *Manges v. Seattle-First Nat'l Bank(In re Manges),* 29 F.3d 1034,1039 (5th Cir. 1994)); *see also In re UNR Indus.* 20 F.3d 766, 769

(7th Cir. 1994)(asking whether it is prudent to disrupt a plan late in time).

1. Failure to Obtain a Stay Pending Appeal

When a court grants a stay pending appeal, progress under the plan and reliance on the plan by third parties are both held in abeyance. Transactions which are difficult to unwind upon appeal are prohibited from moving forward. In the present case, the Lenders petitioned both the bankruptcy court and this District Court for a stay of the Confirmation Order, and the Lenders' motion was denied in both fora. The Lenders did not file for consideration by the Sixth Circuit, and therefore the Plan became effective on July 1. 2003, and proceeded towards substantial confirmation. The Debtor argues that the Lenders' failure to obtain a stay weighs in favor of dismissal. The Lenders argue that because the Court can still fashion effective relief, even in the absence of a stay, the failure to obtain a stay does not moot the appeal. In *City of Covington,* the Sixth Circuit explained the relevance of this factor in the following way,

> A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization. And it is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things on appeal.

City of Covington, 71 F.3d at 1226 (citing *Matter of UNR Indus. Inc.,* 20 F.3d at 769-70). Applying this standard, the Court considers the Lenders' failure to obtain a stay in the context of the resulting confirmation of the plan and the possibility of granting appropriate relief without unwinding the plan. The failure to obtain the stay does not, alone, weigh

against the Lenders, if equitable relief could still be granted in the absence of a stay. Because this Court finds that appropriate relief can be granted under the third prong of this test, the Court therefore finds that the failure to obtain a stay does not require dismissal based on equitable mootness.

2. Substantial Confirmation

Both the Debtor and the Lenders agree that according to 11 U.S.C. § 1102(2) of the Bankruptcy Code, the Plan is already substantially consummated. (Debtor's Mem. of Law in Supp. of Mot. to Dismiss Appeal as Equitably Moot at 5-9; Lenders' Resp. to Mot. to Dismiss Appeal at 9). Under 11 U.S.C. § 1102(2), substantial consummation is defined by three necessary factors:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

While according to *In re PWS Holding Corp.*, 228 F. 3d 224, 236 (3rd Cir. 2000), substantial confirmation is the "foremost consideration" in equitable mootness analysis, the Fifth Circuit has narrowed such broad statements with the following language, "substantial consummation of a reorganization plan is a momentous event, but it does not necessarily make it impossible or inequitable for an appellate court to grant effective relief." *In re U.S. Brass Corp.*, 169 F. 3d 957, 961 (5th Cir. 1999). Therefore, the Court also

weighs this factor in the context of whether the equitable relief sought by the Appellants could still be granted at this point in the confirmation process.

3. Whether the Relief Requested Affect Either the Rights of the Parties not before the Court or the Success of the Plan

The question before the Court under the third prong of the test is whether the relief sought would unravel the plan or divest rights acquired by third parties, also stated as whether piecemeal modification is possible or desirable. See *U.S. Trustee v. Unofficial Committee of Equity Security Holders (In re Zenith Elec. Corp.),* 329 F.2d 338, 346 (3rd Cir. 2003); *see also Bennett v. Veale,* 60 F.3d 828 (6th Cir. June 27,1995)(unpublished)(citing *In re Specialty Equipment Cos.,* 3 F.3d 1043, 1048 (7th Cir. 1993))("Whether or not piecemeal modification can be ordered must be analyzed based upon the specific facts of the case.") The test is designed to reflect the court's concern for "the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting him." *In re Club Assoc.,* 956 F. 2d 1065, 1069 (11th Cir. 1992). Cramdown rulings can be reviewed after plan confirmation and implementation without dismissing for mootness. *Bank of America Nat'l Trust & Sav. Ass'n v. 203 North LaSalle Street Partnership,* 526 U.S. 434 (1999); *In re 203 North LaSalle Street Partnership,* 190 B.R. 595, 596 (N.D. Ill. 1995)

The Debtor argues that if the Court were to grant the relief sought by the Lenders on direct appeal, this would require nothing less than full reversal of the plan. Thus piecemeal modification, Debtor's argue, is neither possible

nor sought. According to the Debtor, the cramdown interest rates and valuation are the foundational issue on which the plan was confirmed. Debtor also emphasizes that the Lenders are seeking reversal of the substantive consolidation, putting at issue all payments made to creditors on the Effective Date which were made out of the pooled assets of the Debtor pursuant to the substantivally consolidated payment and distribution scheme of the plan. Invacare, arguing on behalf of the Creditors' Committee, supports the Debtor's argument as follows:

> If the Plan were to be modified to pay the lenders a higher interest rate, the effect will obviously be higher debt service, lower cash flow, and a significantly lessened possibility that American HomePatient, Inc. could pay unsecured creditors as presently contemplated in the confirmed Plan. This affects every phase of the relationship between American HomePatient, Inc. and its vendors.

(Resp. of Invacare Corp. in Support of Appellee's Mot. to Dismiss Appeal as Equitably Moot, Affidavit of Michael Grospitch, Manager of Financial Services with Invacare Corp. at ¶ 8.) The Creditors' Committee further alleges that a delay in confirmation of plan would affect its negotiation stance in the claims reconciliation process. *(Id.* at ¶10.)

The Lenders respond that the relief sought on direct appeal will not threaten the Debtor's business or injure the Debtor's relationships with other creditors, and therefore should not be dismissed. *See In re Creekstone Apartments Assoc., L.P.*, 1995 WL 588904 (M.D. Tenn. 1995). The Appellant characterizes the appeal as seeking only two modifications in the Plan, neither of which would threaten or injure as described in *In re Creekstone Apartments*

Association: (1) the bankruptcy court's determination of the amount of the Lenders' secured claims and (2) the cramdown rate of return to be paid on the Lenders' secured claims under Class 2 of the Plan. The Lenders note that they do not seek to set aside any payments that have already been made to administrative claimants or creditors under the Plan nor to change the treatment afforded to administrative claimants or unsecured creditors under the plan. (*Id.* at ¶ 34.) Neither do the Lenders seek cancellation or alteration of existing shares in American HomePatient, Inc. An appropriate cramdown rate of return, they argue, can be addressed by simply recognizing the full amount of the Lenders' secured claim and by "providing for the ultimate payment to the Lenders of a market rate of return by accruing the non-cash portion of interest to be paid to the Lenders." (*Id.* at ¶ 35.) This type of remedy, they contend, is consistent with the projections that the Debtors introduced at the Plan confirmation hearing. The Lenders also emphasize that shareholders have actual or constructive notice of this appeal through American HomePatient, Inc.'s recent Security and Exchange Commission filings, press releases, and the public record in this case.

The Court DENIES the Debtor's Motion to Dismiss based on equitable mootness. The appeal and the proposed alterations to the Plan sought on direct appeal merely go "to the extent of the secured creditors' interest. It does not threaten the steps taken by the organized debtor's owners to infuse new capital, nor does it endanger the operation of the ongoing apartment business and the debtor's relationships to other creditors." *Creekstone,* 1995 WL 588904 at 2077. The record is inadequate to show that the plan is not feasible with a different valuation or cramdown rate, and the case law clearly allows appeals that propose changes in the valuation and cramdown interest rate.

B. Direct Appeal

The Lender makes eleven points in its argument against confirmation and characterizes each of the alleged errors of the bankruptcy court as a matter of law.

> The bankruptcy court erred in the methodology it employed to value the Lenders' collateral for cramdown purposes.
>
> The bankruptcy court erred in applying the coerced loan theory by failing to apply the investment band market approach to its determination of the proper cramdown interest rate.
>
> The bankruptcy court erred because the Plan fails to provide a market rate of return to the secured Class 2 creditors, and thus does not provide the lenders with the present value of their fully secured claim.
>
> The bankruptcy court erred because the plan improperly takes assets subject to the liens of the Lenders, without compensating the Lenders, and transfers those assets to Class 6, 7, and 8 claimants, free from the Lenders' liens.
>
> The bankruptcy court erred in substantively consolidating the Debtors.
>
> The bankruptcy court erred because the Debtors failed to file the schedules for the subsidiary Debtors showing assets and liabilities by legal entity.
>
> The bankruptcy court erred because the plan discussed "new value" in a way that violates the absolute

> priority rule, because the Lenders did not receive the full present value of their claims, and the Debtors admitted that they would be insolvent on the effective date of the Plan.
>
> The bankruptcy court erred because by failing to provide a market rate of return to the unsecured Class 5 creditors, the Plan does not provide the Lenders with the present value of their unsecured Class 5 deficiency claim.
>
> The bankruptcy court erred because the Plan does not meet the best interest of the creditors test because the Lenders would receive more in a Chapter 7 liquidation than under the Plan.
>
> The bankruptcy court erred because the Plan fails to provide adequate means for its own implementation.
>
> If the Court finds that any of the Lenders' complaints on appeal may be characterized as challenges to the bankruptcy court's findings of fact, then the bankruptcy court erred and those factual findings are clearly erroneous.

(Brief of the Appellant at 1-3.) The Lenders emphasize that their appeal does not challenge the credibility rulings made by the bankruptcy court, but rather argues that the bankruptcy court both ignored certain undisputed facts and also failed to properly apply the law to the facts.

The Lenders emphasize two alleged errors by the bankruptcy court: (1) the calculation of the collateral value and (2) the calculation of the rate of the cramdown interest rate. The Lenders argue correctly that the methodology

employed by the bankruptcy court in these calculations is a matter of law subject to *de novo* review. *See In re Kidd,* 315 F.3d 671, 675 (6th Cir. 2003). However, after reviewing the bankruptcy court's methodology *de novo,* this Court also reviews the application of the methodology and the selection of the specific numbers under the clear error standard. *Id.* at 677.

1. Valuation

The Plan proposes that the proper valuation of the Debtor's business, and thus the secured portion of the Lenders' claim, is $250,000,000.00. Bankr. Mem. at 27. The Lenders dispute this number, and argue that the number should be in excess of $300,000,000.00. During the hearing on the confirmation of the Plan, the bankruptcy court heard evidence from the Debtor's expert, Patrick Hurst, and the Lenders' experts, Gerald Benjamin and Thomas C. Wylly. Hurst testified that the Debtor's enterprise value fell between $235,000,000.00 and $275,000,000.00. Benjamin and Wylly argued that the correct valuation was between $300,000,000.00 and $320,000,000.00. The bankruptcy court weighed the evidence and credibility of the witnesses, and found Hurst's testimony to be "more persuasive, credible, reliable, understandable and more sustainable." *Id.* at 37. In arriving at this credibility ruling, the bankruptcy court compared the application of three generally accepted approaches to valuation: (1) Market Comparison Approach, (2) Comparable Transaction Approach, and (3) Discounted Cash Flow Approach. The reconciled numbers presented during the confirmation hearing are as follows:

	Mr. Hurst	Mr. Benjamin
Market Comparison	$230,000,000.00 to $260,000,000.00	$285,000,000.00 to $309,000,000.00
Comparable Transaction	$250,000,000.00 to $290,000,000.00	$297,000,000.00 to $330,000,000.00
Discounted Cash Flow	$230,000,000.00 to $260,000,000.00	$337,000,000.00 to $357,000,000.00
Selected Enterprise Value	$235,000,000.00 to $270,000,000.00	$300,000,000.00 to $320,000,000.00

Because of the consistent differences between the ranges of the experts, the bankruptcy court chose between the competing appraisals by balancing factors including: (1) the appraiser's education, (2) training, (3) experience, (4) familiarity with the subject of the appraisal, (5) manner of conducing the appraisal, (6) testimony on cross examination, and (7) overall ability to substantiate the basis for the valuation presented. *Id.* at 36. The Memorandum includes a chart explaining why the bankruptcy court found Mr. Hurst equally or more credible on all of the factors. *Id.* at 36-37. Of particular concern to the bankruptcy court was Mr. Benjamin's apparent overlap in interest with the Lenders, evidenced by the fact that he used "we" during his testimony to "include himself in the Lenders' camp." *Id.* at 37. Mr. Hurst's perceived objectivity, in comparison, was strengthened by the fact that he has been hired by debtors, unsecured creditors, and lenders and has represented varied and often competing interests. *Id.* The bankruptcy court ultimately found Mr. Hurst more credible and therefore found the Debtor's valuation of $250,000,000.00 to be correct.

The Lenders argue that the appeal on the calculation proper valuation is predicated on the bankruptcy court's error in ignoring evidence presented in the expert testimony of Mr. Hurst and Mr. Rosen, the Debtor's witnesses. The Lenders argue that even when accepting the credibility determination made by the bankruptcy court, the undisputed facts presented by these witnesses do not support the bankruptcy court's rulings as a matter of law.

During the confirmation plan hearing, the bankruptcy court concluded that the Debtor's collateral value estimation of $250 million was adequate and overruled the Lenders' objections. Lenders now raise the objections again, arguing that although the bankruptcy court purported to be basing its ruling on the testimony of Mr. Hurst, the decision rests on a misinterpretation of his testimony. Lenders argue that Mr. Hurt testified that the "enterprise value" of the Debtors was $265 million. Lenders distinguish this from the collateral value, to which they allege Mr. Hurst did not testify. The Lenders allege that the bankruptcy court conflated the two numbers erroneously. Lenders argue that the "enterprise value" is the value of the equity plus the funded debt, and excluding the current liabilities and excluding cash. Therefore, to arrive at the collateral value under Bankruptcy Code § 506, the Lenders argue that a figure must add current liabilities and cash to the enterprise value. In this case, the Lenders argue, the bankruptcy court should add $39 million in current liabilities and $23 million in cash to the enterprise value.

The Debtor responds by emphasizing the bankruptcy court's extensive review of testimony on valuation, including the market comparison approach, the comparable transaction approach, and a discounted flow approach, all of which supported the $250 million dollar number. The Debtor agrees

that the excess cash should be added back in, however, Mr. Hurst's valuation includes $12 million dollars of cash already added back. Because the bankruptcy court "unquestionably [found] Mr. Hurst's testimony more persuasive, credible, reliable, understandable and more sustainable" the bankruptcy court did not err it using his estimate on the excess cash. Bankr. Mem. at 37. The Debtor further points out that the enterprise value, as calculated by Mr. Hurst and affirmed by the bankruptcy Court, already accounts for the assumption that the a purchaser would assume current liabilities. Mr. Hurt's testimony explains this as follows:

> The current liabilities have to be paid. And it's really important because of the methodologies that we employ here. It wasn't a liquidation approach. It was a going concern value. And that if the current liability, which are basically trade and accounts payable- you know, the accrued payroll- aren't paid, that's disruptive. Since it's disruptive, you'd have to consider that in your projections and your approaches. And since there's no disruptive elements in terms of what we derived, you have to assume that the current liabilities are going to get paid. And that's part of the business.

(Brief of Appellee at 9-10).

The Court AFFIRMS the bankruptcy court on its finding that the Debtor's valuation of $250,000,000 is correct. The bankruptcy court noted that "[b]ecause the valuation process often involves the analysis of conflicting appraisal testimony, a court must necessarily assign weight to the opinion testimony received based on its view of the qualifications and credibility of the parties' expert witnesses," and considered it the task of the court to consider and weigh competent

evidence accordingly. Bankr. Mem. at 28-29. Mr. Hurst's testimony shows that his range of valuation represents going concern value, and thus the bankruptcy court was not clearly erroneous when it affirmed the Debtor's valuation at $250 million. The bankruptcy court properly reviewed the methodologies used by the competing experts. The credibility determination resulting in a preference for the numbers of Mr. Hurst was not clearly erroneous, and the Lenders' argument that the bankruptcy court ignored evidence presented by Mr. Hurst is without merit for the reason's discussed above.

2. Proper Cramdown Interest Rate

Although the Lenders concede that the Plan meets the conditions for a cramdown according to 11 U.S.C. § 1129(a) because the Plan was accepted by all the impaired classes except the Lenders, the Lenders still argue that the Plan is unconfirmable because the interest rate does not afford the lenders with the present value of their secured claim as required by § 11 U.S.C. § 1129(b)(2)(A)(I). The objections of the Lenders may be overridden pursuant to § 11 U.S.C. § 1129(b)(1) only if the Plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." Furthermore, the plan must provide for the secured creditors to retain their lien on the property for the amount of the secured claim and to receive payments that total the amount of the claim, with a present value equal to the amount of the lien, as required by 11 U.S.C. § 1129(b). The interest rate proposed by the plan is 6.8%, but the Lenders argue that a blended rate of 12.16% is required by law to reflect market place lending and provide them with the present value of their claim. The Lenders arrive at the blended rata of 12.16% number by averaging the following rates available on the open

marked: $104,566,000.00 of senior debt at an assumed rate of 5.24%; $42,777,000.00 of mezzanine debt at 12.5%; and $152,657,000.00 as the equity component at 16.81%.

The Lenders do not dispute the use of coerced loan theory itself, but they argue that the interest rate used by the bankruptcy court in this cramdown was "contrived" and is lower than a market rate of return required by reference to actual market rates for financing available to borrowers in the same industry as the Debtor. Lenders argue that both *Household Auto. Fin. Corp. v. Bruden (In re Kidd),* 35 F.3d 671 (6th Cir. 2003) and *Memphis Bank and Trust Co. v. Whitman,* 692 F.2d 427 (6th Cir. 1982) support their position that a proper application of coerced loan theory necessitates an interest rate of approximately 12%. Both cases hold that the proper market rate of interest for automobile loans is limited by "the automobile loan universe and not rates that would apply to an average borrower seeking, for instance, financing for a new home." *Kidd*, 315 F.3d at 676. *Memphis Bank and Trust* involved an automobile loan in the principal amount of $5,659.00 at a 21% rate of interest under contract. *Memphis Bank and Trust,* 692 F.2d at 430. in both cases, the debtors filed for Chapter 13 protection, and in that context, the Sixth Circuit held that the bankruptcy court should use the current market rate of interest for similar loans in that region. *Id.* at 431. The Sixth Circuit explained further:

> The reason we do not use an arbitrary rate is that such a rate may vary widely from the current market rate. The theory of the statute is that the creditor is making a new loan to the debtor in the amount of the current value of the collateral. Under this theory, the most appropriate interest rate is the current market rate for similar loans at the time the new loan is made, not some other unrelated rate.

Id. The court continued in a footnote:

> The District Court noted that it could not include future or unmatured interest in the "allowed unsecured claim." This appears to be a correct reading of § 501(b) and § 1305. This rule on unsecured claims does not preclude adjusting the market rate on the secured claim up or down, however, when there is substantial difference between the market rate and the rate the parties agreed on by contract. The bankruptcy court should have leeway to adjust the market rate on secured claims based on special circumstances.

Id. at n.3. In *In re Kidd,* 315 F.3d 671, the Sixth Circuit reiterated that the holding in *Memphis Bank & Trust* constitutes the law of the circuit on valuation. *In re Kidd,* 315 F.3d at 678. *In re Kidd* also involves a consumer automobile loan in a Chapter 13 cram down. *Id.* In this case, the original loan at issue was for the principal amount of $14,767.00 to be paid at the contracted interest rate of 20.95% over sixty (60) months. Within the Chapter 13 proceedings, the bankruptcy court set the cram down rate of interest at 10.3%, which the district court and the Sixth Circuit affirmed. The bankruptcy court heard testimony that the appropriate rate of interest should be 20.95% to 25.95% because the loan in question was one made by a "subprime" lender to "individuals whose past credit problems or lack of positive credit history made them unattractive customers for banks, credit unions, and other 'prime' lenders." *Id.* at 675. Because of those circumstances, a higher rate of interest was charged on the loans. *Id.* The bankruptcy judge, however, found most credible the testimony of a bank vice president, who testified that the weighted average for all car loans and for all tiers of borrowers would be 9.3%, consciously averaging data from all tiers of borrowers. *Id.* at 674. In its review of this

decision, the Sixth Circuit discussed the controlling methodology as follows:

> [T]he proper interest rate to be applied in a Chapter 13 cram down is the current conventional market rate used for similar loans in the region, and not necessarily the contract rate. Such a determination does not entail an analysis of any particular debtor's credit rating, but rather involves a more objective determination of the value of money over time so as to compensate a creditor according to the present value of the secured claim.

Id. at 678.

The Debtor does not dispute that the frame of reference should be interest rates in the universe of secured financing for healthcare companies, but the Debtor rejects the investment band approach. The Debtor points out that no Sixth Circuit case applies the investment band theory, and that doing so provides the Lenders with a windfall. The Debtor argues that the Lenders are entitled to an interest rate that is the market rate of return for providers of senior secured financing for healthcare companies, not the rate provided to venture capitalists providing new money. Such a present value rate, as distinguished from a market rate of return, is necessary to balance the rates of other creditors of the debtor. The bankruptcy court rejected the lenders' argument that the lenders were entitled to blend the market rata of senior secured debt with the rate of return on equity and interest rate of return on mezzanine financing.

The Lenders argue that the prevailing market is determined by what it would cost the Debtor to go out and seek new venture capital today. The Debtor argues that in a

Chapter 11 context, the prevailing market rate is that which providers of senior secured financing for companies in the same market would receive. This Court AFFIRMS the ruling of the bankruptcy court upholding the Plan's proposed interest rate. Both parties rely substantially on the Sixth Circuit cases cited above, whose facts are substantially different– consumer car loans under Chapter 13. Neither party cites to a case in the Sixth Circuit case adopting the investment band theory in an analogous case. Without such a holding by the Sixth Circuit, the Court follows the current case law and AFFIRMS the bankruptcy court's ruling that as a matter of law, the market rate consists of the market rate for senior secured debt for a given industry and excludes rates of return based on mezzanine financing and equity.

3. Substantive Consolidation

The Lenders renew their objection to substantive consolidation as raised in the Memorandum of Law in Support of Motion for Stay of Bankruptcy Court Order Pending Appeal Pursuant to Fed. R. Bankr. P. 8005, arguing that this move is no longer available to bankruptcy courts after *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). The Lenders argue that the Plan's substantive consolidation of the assets and liabilities of the Debtors is also an error. Because the Debtor did not separately solicit votes from each creditor for each debtor prior to the proposed consolidation, the Lenders argue that the bankruptcy court had no legal basis to approve the

consolidation.[1] Lenders emphasize that the Debtors admitted their ability to segregate assets and liabilities, and they are required to do so as part of their state tax and corporate law reporting functions. Additionally, they argue that the Supreme Court's holding in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), creates an open appellate question as to whether a bankruptcy court can authorize equitable substantive consolidation.

Debtors' respond that pursuant to § 1125, the bankruptcy court's conclusion concerning substantive consolidation is sound. The bankruptcy court noted that it can consolidate cases involving related debtors pursuant to 11 U.S.C. §§ 105.302(b); Fed. R. Bankr. P. 1015(b), but also noted that the analysis is highly fact specific in every case. The bankruptcy court cited eleven factors to be considered, and applied those factors to reach the decision that "the testimony and other proof overwhelmingly establishes that substantive consolidation is not only appropriate but necessary for the efficient reorganization." Bankr. Mem. at 15-16. The bankruptcy court explicitly rejected the Lenders' argument as follows:

> The [Lenders] suggested that because the debtors are separate legal entities, have filed separate state tax returns and financial statements, engage in separate reporting to Medicare and Medicaid, and because assets and liabilities can be separated, that substantive

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[1] Debtor instead transmitted "identical, single ballots" to all creditors. (Mem. of Law in Support of Motion for Stay of Bankr. Ct. Order Pending Appeal Pursuant to Fed. R. Bankr. P. 8005 at 11)

> consolidation is not appropriate. The court disagrees since this is done solely for tax reasons.

Id. at n.10. Finally, the Debtors cite to *In re Stone and Webster, Inc.*, 286 B.R. 532, 542 (Bankr. D.Del. 2002), for the proposition that there is no legal difference between seeking a ruling in advance of the confirmation hearing, versus seeking a ruling as part of the confirmation hearing that substantive consolidation is allowable in a Chapter 11 plan.

Pursuant to 11 U.S.C. §§ 105, 302(b), the bankruptcy court may consolidate cases involving related debtors. This Court AFFIRMS the bankruptcy court's decision that *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) does not affect its ability to authorize consolidation when such remedy is warranted.

4. Other Objections

Additionally, the Lenders have raised the following objections and referred to arguments made in prior documents submitted to the bankruptcy court. The Court finds that these objections are without merit. First, the Lenders argue that the Debtor failed to file schedules for the subsidiary Debtors showing assets and liabilities by legal entity, pursuant to 11 U.S.C. § 1129(a)(2). The bankruptcy court overruled this objection because of the substantive consolidation of the debtors and because of the lack of prejudice to any party. This Court AFFIRMS that ruling.

Secondly, the Lenders object that the confirmed plan is a disguised "new value" plan that violates the absolute priority rule pursuant to 11 U.S.C. § 1129(b)(2). The bankruptcy court found that the Plan provided for Lenders with the

present value of their Class 2 claims and that it is a 100% Plan. This objection is without merit and this Court AFFIRMS the ruling of the bankruptcy court overruling this objection.

Third, the Lenders argue that the Plan fails to provide a market rate of return to unsecured Class 5 creditors, in violation of 11 U.S.C. § 1129(b)(2). The bankruptcy court rejected the initial rate of 5.43% proposed by the Plan. Bankr. Mem. at 49. Also rejected was the rate of 16.8% suggested by the Lenders because it treated the note as an equity risk rather than a debt instrument and would provide the Lenders with a windfall. The bankruptcy court ultimately set the rate at LIBOR plus 7.25% fixed for the three year term of the note, based on the testimony of Mr. Wylly, an expert for the Lenders. Bankr. Mem. at 49, 52, 54. This Court AFFIRMS the decision as not clearly erroneous as a matter of fact.

Fourthly, the Lenders argue that the because the Lenders would receive more in a Chapter 7 liquidation than under the Plan, the Plan fails to meet the best interest of creditors test under 11 U.S.C § 1129(a)(7). The bankruptcy court found that the Debtor had met its burden of poof to overcome this objection. The bankruptcy court was satisfied that the evidence presented showed that the uncertainties following conversion under Chapter 7 would reduce any potential return to creditors, explaining that, "because the debtor is proposing a 100% payment to all creditors and recovery in a chapter 7 is unknown or at the very least speculative in this case, the court finds that this plan satisfies § 1129(a)(7)." Bankr. Mem. at 19. This Court AFFIRMS the decision of the bankruptcy court overruling this objection.

Finally, the Lenders argue that the Plan fails to provide adequate mans for its own implementation, as required by 11 U.S.C. §§ 1123(a)(5) and 1129(a)(1). This objection is also without merit.

In sum, this Court finds all of these objections to be without merit and AFFIRMS the bankruptcy court's findings of fact and conclusions of law on all matters.

III. Conclusion

In conclusion, the Debtors' Motion to Dismiss as Equitably Moot is DENIED. Although the Lenders did not obtain a stay, and the Plan was substantially confirmed, the harm to others by making the Lenders' proposed changes in the Plan is not substantial enough to warrant the extreme relief of dismissal for equitable mootness.

For the reasons more fully discussed above, this Court AFFIRMS the decision of the bankruptcy court on all grounds.

/s/_____
Thomas A. Wiseman, Jr.
Senior United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Case No. 302-08915
Chapter 11(Jointly Administered)

[Filed May 15, 2003]

In Re: AMERICAN HOMEPATIENT, INC., ET. AL., Debtor.	)

George C. Paine, II, Judge
United States Bankruptcy Court

MEMORANDUM

I. Introduction

The issue before the court is whether to confirm American HomePatient Inc.'s (hereinafter "debtor") Second Joint Amended Chapter 11 Plan that was proposed by the debtor in conjunction with the Official Committee of Unsecured Creditors.[1] Confirmation was consensual as to all creditors

[1] Debtor means American HomePatient, Inc., a Delaware corporation, American HomePatient, Inc., a Tennessee corporation, Designated Companies, Inc., AHP Finance, Inc., American

except the Bank of Montreal, Administrative Agent for a group of secured lenders (hereinafter "Lenders").[2] The Lenders take a shotgun approach in their objections to confirmation, asserting that the Second Joint Amended Plan is unconfirmable based upon at least eleven grounds: (1) the

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HomePatient, Inc., American HomePatient of New York, Inc., National Medical Systems, Inc., Sound Medical Equipment, Inc., The National Medical Rentals, Inc., National I.V., Inc., American HomePatient of Arkansas, Inc., American HomePatient of Nevada, Inc., Volunteer Medical Oxygen & Hospital Equipment Co., Alleghany Respiratory Associates, Inc., American HomePatient of Illinois, Inc., American HomePatient of Texas, L.P., AHP L.P., AHP Home Medical Equipment Partnership of Texas, Colorado Home Medical Equipment Alliance, LLC, Northeast Pennsylvania Alliance, LLC, Northwest Washington Alliance, LLC, AHP Home Care Alliance of Tennessee, AHP Alliance of Columbia, AHP Knoxville Partnership, AHP Home Care Alliance of Gainesville, AHP Home Care Alliance of Virginia.

[2] "Lenders" mean Bank of Montreal as Administrative Agent for a group of participating lenders including Allstate-AIMCO CDO Series 2000-A, Allstate Life Insurance Company, Bank of America, N.A., Bank of Montreal; Barclays Bank PLC, Bear Stearns & Co. Inc., Deutsche Bank Trust Company Americas f/k/a Bankers Trust Company; Endeavor LLC, Everest Capital Master Fund L.P., Femwood Associates L.P., General Electric Capital Corporation, California Public Employees' Retirement System (Highland), Highland Crusader Offshore Partners, L.P. (Highland); ML CBO IV (Cayman)/Protective (Highland), PAM Capital Funding, L.P. (Highland), Pamco Cayman Ltd. (Highland), HCM/Z Special Opportunities LLC a/k/a HZ Special Opportunities, LLC (Highbridge Capital), Long Lane Master Trust IV; Morgan Stanley Prime Income Trust, PPM America Special Investments Funds, L.P., Fuqua Family Fund, L.P. (Tennenbaum), Special Value Bond Fund II, LLC (Tennenbaum), Van Kampen VKM Prime Rate Income Trust, and Van Kampen Senior Income Trust.

plan does not comply with all applicable provisions of the Code (1129(a)(1)), specifically in that the plan improperly provides for substantive consolidation of the debtors; (2) the plan proponents do not comply with applicable provisions of the Code (1129(a)(2)); (3) the plan is not proposed in good faith (1129(a)(3)); (4) the plan does not meet the best interest of creditors test (1129(a)(7)); (5) confirmation is likely to be followed by liquidation, i.e. the plan is not feasible (1129(a)(11)); (6) the plan improperly classifies certain classes of claims (1129(b)(1)); (7) the plan unfairly discriminates as to Class 5 (1129(b)(1)); (8) the plan is not fair and equitable because it violates the absolute priority rule (1129(b)(2)); (9) the plan is not fair and equitable because the rate of interest does not provide the Lenders with the present value of their secured claim (1129(b)(2)); (10) the plan is not fair and equitable because the interest rate on their unsecured deficiency claim is too low (1129(b)(2)); and (11) the plan is not fair and equitable in that it improperly values the Lenders' allowed secured claim (1129(b)(2)). At trial, however, the Lenders focused primarily on issues relating to interest rate, valuation, absolute priority rule, and feasibility. The court will address all issues as it assumes that the Lenders have not withdrawn their myriad objections.

For the reasons explained more fully herein, the court orders these debtors substantively consolidated and overrules all of the Lenders' objections to confirmation. The court orders counsel for the debtor to prepare an order confirming this plan within ten (10) days of entry of this Memorandum approving confirmation of the Second Joint Amended Plan.

II. Factual Background

A. General Factual History

The parties stipulated to the following background information at the confirmation hearing:

1. On July 31, 2002, (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11, Title 11, United States Code (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Middle District of Tennessee (the "Bankruptcy Court"). Pursuant to 11 U.S.C. §§ 1107(a) and 1108, the Debtors are operating their businesses and managing their property as Debtors-in-Possession.

2. No trustee or examiner has been appointed. One official committee of unsecured creditors has been established. One official committee of equity security holders has been established.

3. This is a core proceeding over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(L) and 1334(b). Venue is appropriate in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. Debtor American HomePatient, Inc., a Delaware corporation, through its subsidiaries and affiliates has 285 retail business locations in 35 states. The Companies' corporate offices and headquarters are located in Brentwood, Tennessee. The stock of American HomePatient, Inc. is publicly-traded in the OTC market. American HomePatient, Inc. has in excess of 1,750 shareholders.

5. As of March 7, 2003, the Companies had approximately 3,458 employees.

6. The Companies are engaged in the business of providing home health care services and products, consisting primarily of respiratory and infusion therapies and the rental and sale of home medical equipment and home health care supplies. Most of these products and services are provided directly to the Companies' customers in their homes. As of December 31, 2002, the Companies had approximately 300,000 customers.

7. For the year ended December 31, 2002, home respiratory services, home infusion services and home medical equipment and supplies represented 66%, 14%, and 20% of revenues, respectively. Home respiratory services include oxygen systems, nebulizers, aerosol medications and home ventilators and are provided primarily to patients with severe and chronic pulmonary diseases. Home infusion services are used to administer nutrients, antibiotics and other medications to patients with medical conditions such as neurological impairments, infectious diseases or cancer. The Companies also sell and rent a variety of home medical equipment and supplies, including wheelchairs, hospital beds and ambulatory aids.

8. The services and products provided by the Companies are paid for primarily by Medicare, Medicaid and other third-party payors on a fee-for-service basis. The Companies operate approximately 22 billing centers whose primary function is to bill and collect for the services rendered and products sold through the Companies' retail centers.

9. All of the Companies' employees are employed by American HomePatient of Tennessee, Inc. The Companies' cash collections are deposited into separate accounts maintained for each branch. Thereafter the cash is concentrated in American HomePatient, Inc., which in turn pays all amounts due to the Companies' creditors.

10. The Secured Lenders' credit agreement ("Credit Agreement") was drafted naming only American HomePatient, Inc. as obligor and all other entities as guarantors. The Secured Lenders claim liens in all or substantially all the assets of the Companies, including a pledge of the stock of each Debtor other than AmericanHome Patient, Inc.

B. History of the Lender's Secured Debt

American HomePatient, Inc. was formed as a Delaware corporation in 1991. (Disclosure Statement, p. 5). The Lenders consist of a group of approximately 24 entities that loaned to the debtor throughout their relationship, and the configuration of lenders has varied significantly as demonstrated by a change in ownership of over 40% of the debt in just 2001.[3] The Lenders assert a lien on substantially

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[3] The make-up of the Lender group has changed significantly since the original credit facility was entered into, and subsequently amended from 1994 forward.

Lender	1998	1999	2000	2001	2002
1st Chicago	3.75	3.75	3.75		
1st Union/First America	10.00	10.00	14.22		
ABN Amro	6.75	6.75	6.75		

Lender	1998	1999	2000	2001	2002
Allstate-AIMCO CDO				1.02	1.02
Allstate Life Insurance Co.				1.69	0.99
AmSouth	8.75	8.75	6.22		
Bank of America	17.50	17.50	17.50		
Bank of America Secur.				4.75	7.64
Bank of Montreal	6.25	6.25	6.25	6.25	6.25
Bankers Trust/Deustche	9.25	9.25	9.25	8.52	0.01
Barclays Capital PLC				3.67	4.24
BBT Fund, LP				2.7	
Bear Stems			2.55	1.22	1.22
Citibank, NA			6.18		
Continental Casualty Co.			6.18		
Endeavor LLC					2.43
Everest Capital Limited				2.87	3.56
Femwood Associates				11.47	7.91
Franklin Floating Rate Trust				9.17	
Fuji	3.75	3.75	3.75		
Gen. Elec. Capital Corp.				4.05	7.77
Goldman Sachs CR PT				3.5	
Highbridge Capital					3.15
Highland*				24.66	37.45
Long Lane Master Trust IV					1.69

Lender	1998	1999	2000	2001	2002
Morgan Stanley Prime IncTrt				3.38	3.38
Orix USA				1.69	
PNC Bank	8.25	8.25			
PPM Amer Spec. Inv. Fund					3.43
RABO	8.25	8.25	8.25		
SAKURA	1.25	1.25	1.25		
Satellite Senior Inc. Fund				4.33	
Suntrust	8.75	8.75	8.75		
Tennenbaum/Fuqua Fam.					0.11
Tennenbaum Special Value					5.29
Union Bank (California)	3.75	3.75			
Union Bank (Switzerland)	3.75	3.75	3.75		
Van Kampen Sr. Inc. Trst.				0.33	2.15
Van Kampen VKM Prime				0.31	0.31
WM Simon			1.58		

Exhibit 48. The "snap shot" dates are 10/98, 3/99, 4/00, 11/01, 11/02 (as provided in proof of claims filed with the court). The dates of the amendments to the original credit agreements are as follows:

First Amendment to Fourth Restated Credit Agreement 10/98
Second Amendment to Fourth Restated CreditAgreement 3/99
Third Amendment to Fourth Restated Credit Agreement 4/00
Fifth Amendment and Restated Credit Agreement 5/25/01

all assets of the debtor including accounts, chattel paper, inventory, equipment, instruments, general intangibles, fixtures, equity interests in subsidiaries and joint ventures, agreements, intellectual property, and real estate owned by the Company. (Disclosure Statement, p. 30).

Most of the debtor's secured debt was acquired between 1994 and 1998 when the debtor undertook over 100 acquisitions, mostly of branch offices. (Disclosure Statement, p. 22). During that time the credit facility increased every year, from $ 60 million in 1994, including two increases in 1997, hitting a peak availability of $400,000,000 in 1997. (Testimony of Joseph Furlong; Disclosure Statement, p. 22). The debtor slowed acquisitions in 1998, but during 1998, the debtor owed more than $323,000,000 to the Lenders. (Disclosure Statement, p. 22). As of the petition date, the total amount due to the Lenders under the credit facility was approximately $ 275.4 million.

The debtor changed to a new management team in early 1999 consisting of Joseph F. Furlong, Chief Executive Officer, Marilyn A. O'Hara, Senior Vice President and Chief Financial Officer, and Thomas E. Mills, Chief Operating Officer. Under this team, the debtor reduced the amount owed under the credit facility to $311 million at the end of 1999, $297 million at the end of 2000, and $281 million at the 2001 year-end. (Testimony of Joseph Furlong; Disclosure Statement, p. 23). As of the petition date of July 31, 2002, the Lenders were owed in excess of $275 million under the

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*Highland includes the following entities: California Public Employees Retirement System (0.73%), Highland Crusader Offshore Partners (2.18%), ML CBO IV (Cayman)/ Protective (7.8%), PAM Capital Funding, LP (16.07%), and PAMCO Cayman Ltd. (10.68%).

credit facility which had a maturity date of December 31, 2002.

C. Factors Leading to the Filing of Bankruptcy and Post-Petition Factual Background

According to the debtor, multiple factors led to the filing under chapter 11, but most significant among them was the looming maturity date of December 31, 2002 under the credit facility. (Testimony of Joseph Furlong; Disclosure Statement, p. 23). Prior to the Fifth Amendment to the Restated Credit Agreement signed May 25, 2001, the debtor was facing an April 2002 maturity date. (Testimony of Joseph Furlong). The newly negotiated credit facility gave a new maturity date of December 31, 2002, and provided the Lender with an interest rate of either (the debtor's choice): (1) the LIBOR/Eurodollar rate plus 3.5% or (2) prime rate plus 2.75%, and on top of that an excess leverage charge as long as the debt exceeded four times EBITDA. The interest rate under the newly renegotiated credit facility equated to approximately 6.5%, and the debtor consistently selected the lower LIBOR rate.[4] (Testimony of Joseph Furlong; Fifth Amended Restated Credit Facility, p. 24). Critical to the debtor's downward financial spiral, were the 1997 changes in the law that reduced Medicare reimbursement rates for oxygen related services by 25%.[5] These changes decreased the debtor's pre-tax income by an estimated $24.5 million during 1998.

When it became clear to the debtor that the maturity date

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[4] Although the Lenders were entitled to the excess leverage charge, the debtor was never in default under the credit facility.

[5] The 25% reduction became effective January 1, 1998, and an additional 5% reduction occurred on January 1, 1999.

of December 2002 could not be met, the debtor sought to extend the maturity date to December 2005. The Lenders refused that request, and in addition, would not provide the debtor with any revolving credit under the newly, renegotiated credit facility.[6] To stem the tide of uncertainty surrounding how the maturity date would be met, the debtor decided to file the chapter 11 petition on July 31, 2002. (Testimony of Joseph Furlong).

Post-petition, the Lenders and debtor entered into an Agreed Order Authorizing the Use of Cash Collateral giving the debtor use of cash collateral, and requiring adequate protection payments to the Lenders in the amount of $1.6 million per month.[7] Post-petition, the debtor's business has continued uninterrupted, and the debtor's EBITDA has exceeded expectations year-to-date through October, 2002. Furthermore, the bad debt has been reduced, net patient account's receivables balances have been reduced, the number

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[6] According to the testimony of Mr. Furlong, the debtor had enjoyed revolver privileges under the previous credit facilities, but due to the current "non-bank" type make-up of the lender group (as opposed to the original traditional bank lenders) when the Fifth Amended Restated Credit Agreement was re-negotiated, no revolver provision was provided.

[7] The parties stipulated at the confirmation hearing as follows with respect to post-petition operations:

> 14. EBITDA for 2002 was over $47 million. The Companies' cash position was $7 million on the Petition Date and is currently approximately $20 million.
>
> 15. The Debtors have paid approximately $12.8 million in adequate protection payments to the Secured Lenders since the Petition Date.

of billing centers has been reduced, consolidated cash balances are growing, and staffing levels have been reduced in certain business areas. (Testimony of Mr. Furlong).

The debtor's proposed plan, as it relates to the Lenders proposes the following treatment:

> **Class 2 – Secured Claims of Lenders.** The Class 2 Claims shall be satisfied by the Debtors' execution of a promissory note in a principal amount equal to the Lenders' Collateral Value. Such note shall be substantially in the form attached as Exhibit 1 to the Plan. The note shall bear interest from the Effective Date at the Secured Claim Interest Rate; shall provide for monthly payments of interest in arrears; and shall be due and payable in full on the sixth anniversary of the Effective Date. The note shall also require principal payments as follows: (i) beginning in fiscal year 2004, principal payments equal to one-third of the Excess Cash Flow during that fiscal year; and (ii) after the Class 5 and Class 8 Claimants are paid in full, payments equal to all of the Excess Cash Flow during each fiscal year. The note may be prepaid in whole or in part at any time without penalty. The amount of each year's Excess Cash Flow payment shall be paid in full no later than March 31, of the following year, provided that an estimated prepayment of Excess Cash Flow shall be made on September 30, 2004 and September 30 of each year thereafter. The amount of this estimated payment shall be equal to one-half of the amount of anticipated Excess Cash Flow for the fiscal year as determined by the Company in good faith after taking into account all of the Reorganized Debtors' cash on hand and anticipated cash needs during the remainder of the

fiscal year. As security for payment of the note, the Class 2 Claimants shall retain all Liens held as of the Petition Date, without the need for the execution of any new financing statements or security agreements. All payments due to the Class 2 Claimants shall be paid to Bank of Montreal, as Administrative Agent.

Class 5 – Unsecured Claims of Lenders. Each Allowed Unsecured Claim in this Class shall be paid in full; shall bear interest from the Effective Date at the Unsecured Claim Interest Rate and shall be paid in six, equal semi-annual installments due on June 30 and December 31, provided however that the holders of the Class 5 Claims will also receive a Pro Rata payment on March 31, 2004 and on March 31, 2005. The amount of each Pro Rata Payment received by the holders of the Class 5 Claim shall reduce and be a credit against any mandatory installment payments coming due after receipt of each Pro Rata Payment. The Pro Rata Payments due on March 31, 2004 for the preceding year shall be equal to all of the Excess Cash Flow. Any Pro Rata Payment due on March 31, 2005 shall be equal to two-thirds of the Excess Cash Flow. Additionally, an estimated prepayment of the Pro Rata Payment shall be made on September 30, 2003 and September 30, 2004. The amount of this estimated payment shall be equal to one-half of the amount of the anticipated Pro Rata Payment for the fiscal year as determined by the Company in good faith after taking into account all of the Reorganized Debtors' cash on hand and anticipated cash needs during the remainder of the fiscal year. Further, the amounts due the Class 5 Claimants may be prepaid in whole or in part at any time without penalty, provided however that any prepayment must be made on a Pro

> Rata basis with Class 8 Claimants, any partial prepayments shall reduce and be a credit against any mandatory payments coming due after the time of the prepayment. All payments due to the Class 5 Claimants shall be paid to Bank of Montreal, as Administrative Agent. The Deficiency Claim Payment Credits shall be applied as a credit against any payments due Allowed Claimants under this Section until the Deficiency Claim Payment Credits have been reduced to zero.

Second Amended Joint Plan of Reorganization (p. 11-12, 13-14).

The parties stipulated the following at the confirmation hearing regarding the plan and disclosure statement:

16. On July 31, 2002, simultaneous with the filing of their voluntary petitions, the Debtors filed a joint Plan of Reorganization. On January 2, 2003, the Debtors filed their Second Amended Joint Plan of Reorganization Proposed by the Debtors and The Official Unsecured Creditors Committee (the "Second Amended Plan") and Disclosure Statement for the Second Amended Plan. The Court entered an order on February 26, 2003 (the "Disclosure Statement Order") approving the Debtors' Disclosure Statement subject to certain modifications agreed on by the Parties. On February 26, 2003, the Debtors filed their First Amended Disclosure Statement for the Second Amended Plan (the "First Amended Disclosure Statement").

17. The Debtors mailed copies of the Second Amended Plan, the First Amended Disclosure Statement, the Disclosure Statement Order and a Ballot to all

creditors. Said mailing was in compliance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. The Debtors' tabulation agent, Wachovia Information Consulting Group, properly counted and tabulated all ballots received. Solicitation in connection with the Second Amended Plan was appropriate and the protections afforded by 11 U.S.C. § 1125(e) should apply to such solicitation.

18. The Plan provides that all equity holders shall retain their equity position in American HomePatient, Inc. and the Companies shall continue operating.

19. Impaired classes 1,3,4,7, and 8 have voted to accept the Plan. Excluding the ballots cast by the Agent and the Secured Lenders, of the in excess of one thousand (1000) ballots received, five (5) were rejections.

20. The Secured Lenders asserted a claim against the Debtors as of the Petition Date in the aggregate principal amount of $275,395,354.88 plus letter of credit obligations of $3,350,000 plus other amounts set out in the proofs of claim filed by the Secured Lenders.

21. Each of the 24 Secured Lenders separately filed a proof of claim in the separate bankruptcy case for each Debtor. The 24 Secured Lenders filed approximately 600 proofs of claim against the 25 Debtors.

22. As of April 16, 2002, the Agent's records reflect that the total amount owed to the Secured Lenders is approximately $288,000,000, consisting of the principal balance of $275,395,354.88, funded letters

of credits of $3,310,000, accrued interest, fees and cost of collection (through March 31, 2003) of approximately $20,670,977.07, less adequate protection payments of $ 12,795,414.49, all as further set out in Exhibit 102. The Agent projects this amount to increase to approximately $290,000,000 by June 30, 2003, the proposed Effective Date of the Plan. For purposes of the Confirmation Hearing only, the Debtors do not dispute amounts claimed to be owed to the Secured Lenders consisting of principal amounts and amounts that were funded for letters of credit.

23. Each of the 24 Secured Lenders cast ballots rejecting the Plan using the form supplied by the Debtors. In addition, each of the 24 Secured Lenders submitted a separate ballot in each of the 25 cases for each Debtor rejecting the Plan. The Ballots submitted labeled with the names of each Debtor separately are not included in the Ballot Tabulation results. No other creditor cast a ballot in the name of any separate Debtor.

24. The Agent filed an objection to confirmation of the Plan.

25. According to the records of the Agent, the entities listed on the schedule attached hereto as Exhibit "A" were the lenders and issuers of letters of credit relevant to this matter in the principal amounts set forth on the schedule as of April 21, 2003.

(Stipulations for April 23, 2003 Confirmation Hearing, p. 3-5). It is against this backdrop, that the Lenders raise objections to confirmation.

III. Discussion

A. Confirmation Generally and Objections Raised

1. "Cramdown" Confirmation Generally

There are two conditions for a cramdown. First, all requirements of § 1129(a) must be met (save for the plan's acceptance by each impaired class of claims or interests, ***see* 11 U.S.C. § 1129(a)(8)**). Critical among them are the conditions that the plan be accepted by at least one class of impaired creditors, ***see* 11 U.S.C. § 1129(a)(10),** and satisfy the "best-interest-of-creditors" test. ***See* 11 U.S.C. § 1129(a)(7).** Here, all impaired classes voted for the plan except for the Lenders. ***See Bank of America National Trust & Savings Assoc. v. 203 North LaSalle Street P'ship.,*** 526 U.S. 434, 442, 119 S. Ct. 1411, 143 L. Ed. 2d 607 (1999).

Second, the objection of an impaired creditor class may be overridden only if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." ***See* 11 U.S.C. § 1129(b)(1).** As to a dissenting class of secured creditors, the plan must provide for the creditor to retain its lien on the property for the amount of the secured claim and to receive payments that total the amount of the claim, with a present value equal to the amount of the lien. As to a dissenting class of unsecured creditors, the plan must provide for the claim's payment in full, or alternatively, that no junior claim or interest receive any value in the property on account of its claim or interest. Thus, the undersecured creditor's unsecured claim must be paid in full before principals of the debtor can receive or retain any interest in the reorganized debtor's property on account of their

ownership interest in the bankrupt debtor. *See* 11 U.S.C. § 1129(b)(2)(A)(i) and (b)(2)(A)(ii).

2. Objections of the Lenders

The Lenders raised the following objections to confirmation: (1) the plan does not comply with all applicable provisions of the Code (1129(a)(1)), specifically in that the plan improperly provides for substantive consolidation of the debtors; (2) the plan proponents do not comply with applicable provisions of the Code (1129(a)(2)); (3) the plan is not proposed in good faith (1129(a)(3)); (4) the plan does not meet the best interest of creditors test (1129(a)(7)); (5) confirmation is likely to be followed by liquidation, i.e. the plan is not feasible (1129(a)(11)); (6) the plan improperly classifies certain classes of claims (1122); (7) the plan unfairly discriminates as to Class 5 (1129(b)(1)); (8) the plan is not fair and equitable because it violates the absolute priority rule (1129(b)(2)); (9) the plan is not fair and equitable because the rate of interest does not provide the Lenders with the present value of their secured claim (1129(b)(2)); (10) the plan is not fair and equitable because the interest rate on their unsecured deficiency claim is too low (1129(b)(2)); and (11) the plan is not fair and equitable in that it improperly values the Lenders' allowed secured claim (1129(b)(2)). As to all other confirmation provisions, pursuant to § 1129 and title 11, the court finds that through the uncontested testimony of Mr. Joseph Furlong, American HomePatient CEO, and Thomas Mills, COO, the debtor has met its burden of proof to establish that the Joint Second Amended Plan is confirmable.

Accordingly, the court will address each of the Lender's objections to determine if this Plan is otherwise confirmable.[8]

B. 1129(a)(1) (Substantive Consolidation Objections)

Section 1129(a)(1) requires that "the Plan complies with all applicable provisions of this title. The Lenders contend that the plan does not comply with all applicable provisions of the title because the plan calls for substantive consolidation. The Lenders posit that because substantive consolidation is prohibited under the law and is improper in this case, the plan is unconfirmable pursuant to § 1129(a)(1). The Lenders objections are as follows: (1) the court does not have the authority to substantively consolidate; (2) the assets and liabilities of the debtors can be easily segregated; (3) substantive consolidation will eliminate the rights of the Lenders to recover from the assets of the subsidiary debtors; and (4) the debtor's basis for consolidation is to eliminate potential classification and voting problems, and is therefore improper.

The plan calls for substantive consolidation of all of the debtor entities. The specific plan provisions regarding substantive consolidation provide:

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[8] The Lenders did not provide any testimony whatsoever to support their objection to confirmation on the basis of 1129(a)(3)'s good faith requirement at the confirmation hearing. Accordingly, the court finds that this provision has likewise been satisfied.

ARTICLE VI
SUBSTANTIVE CONSOLIDATION

The Confirmation of the Plan shall effect the substantive consolidation of the Debtors as follows:

(a) The assets of the Debtors shall be treated as a single consolidated estate;

(b) A Claim against any one of the Debtors shall be treated as a single claim against the consolidated estate;

(c) All intercompany claims between and among the Debtors are eliminated for purposes of this Plan so that such claims shall not be classified, will not vote and will not receive any distribution under this Plan.

(d) All claims filed by the same Creditor against more than one Debtor are eliminated to the extent that such claims are duplicate claims;

(e) The separate corporate structures of the Debtors shall continue.

(Second Amended Joint Plan of Reorganization, p. 15). The debtors argue that substantive consolidation is necessary because it is consistent with the way the company does business, and it is also in the best interest of creditors.

Substantive consolidation in bankruptcy is a process by which the assets and liabilities of different entities are consolidated and treated as a single entity. The consolidated assets create a single fund from which all of the claims against

the consolidated debtors are satisfied. The Lenders argue that in light of the United States Supreme Court's ruling in ***Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.***, 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999), that the court may not have the authority to order substantive consolidation. The court disagrees.

In ***Grupo Mexicano,*** the Supreme Court held that federal courts do not have authority to grant provisional remedies pursuant to Fed.R.Civ.P. 65 to potential creditors who have not received judgments against a defendant. 527 U.S. at 333. ("Because such a remedy was historically unavailable from the court of equity, we hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages."). Nothing about ***Grupo Mexicano*** bars this court from authorizing substantive consolidation where appropriate. ***See e.g., In re Stone & Webster, Inc.*** 286 B.R. 532 (Bankr. D. Del. 2002). The Bankruptcy Court for the District of Delaware aptly reasoned:

> The remedy of substantive consolidation was recognized by the Supreme Court as early as 1941. ***See Sampsell v. Imperial Paper & Color Corp.,*** 313 U.S. 215, 61 S. Ct. 904, 85 L. Ed. 1293 (1941) (in upholding consolidation, noting that "power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete"). Moreover, its roots extend to at least as far back as the Bankruptcy Act of 1898, and nothing in the Bankruptcy Code or case law suggests that the remedy is not available today. ***In re Bonham,*** 229 F.3d 750, 765 (9th Cir. 2000) ("Even though substantive

> consolidation was not codified in the statutory overhaul of bankruptcy law in 1978, the equitable power undoubtedly survived enactment of the Bankruptcy Code. No case has held to the contrary.").

Id. at 538. This court finds that the ***Grupo Mexicano*** decision does not limit this court's authority to order substantive consolidation when such remedy is warranted.

In exercising its equitable discretion, a bankruptcy court may consolidate cases involving related debtors. 11 U.S.C. §§ 105, 302(b); Fed. R. Bankr.P. 1015(b). "Substantive consolidation is employed in cases where the interrelationships of the debtors are hopelessly obscured and the time and expense necessary to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all of the creditors." ***First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin. Servs.),*** 974 F.2d 712, 720 (6th Cir. 1992) (quoting ***Evans Temple Church of God in Christ & Community Ctr., Inc. v. Carnegie Body Co. (In re Evans Temple Church of God in Christ & Community Ctr., Inc.),*** 55 B.R. 976, 981 (Bankr. N.D. Ohio 1986)).[9] Implicit

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[9] The analysis is highly fact-specific in every case. ***See FDIC v. Colonial Realty Co.,*** 966 F.2d 57 (2nd Cir. 1992) (substantive consolidation analysis requires "a searching review of the record, on a case-by-case basis"). Some of the factors developed by the courts are similar to the factors that would be considered in determining whether to pierce the corporate veil of a corporation and hold shareholders liable for the corporation's debts. These include:

1. Parent corporation owns all or a majority of the stock of the subsidiary.

2. Parent and subsidiary have common officers and directors.

3. Parent finances the subsidiary.

4. Parent is responsible for incorporation of the subsidiary.

5. Subsidiary has grossly inadequate capital.

6. Parent pays salaries, expenses or losses of subsidiary.

7. Subsidiary has substantially no business except with the parent.

8. Subsidiary has essentially no assets except for those conveyed by the parent.

9. Parent refers to subsidiary as department or division of parent.

10. Directors or officers of subsidiary do not act in interests of the subsidiary, but take directions from the parent.

11. Formal legal requirements of the subsidiary as a separate and independent corporation are not observed.

See In re Gulfco, 593 F.2d 921 (10th Cir. 1979); ***In re Tureaud,*** 45 B.R. 658, 662 (Bankr. N.D. Okla. 1985), ***aff'd, Heller v. Langenkamp (In re Tureaud),*** 59 B.R. 973 (N.D. Okla. 1986); ***In re Affiliated Foods, Inc.*** 249 B.R. 770, 776 (Bankr. W.D. Mo. 2000) (listing factors).

Many of the above listed factors are present in this case. ***See e.g.,*** **Exhibit 23** (showing corporate structure); **Exhibit 26**

in this decision is the conclusion that the benefit--protection of the possible realization of any recovery for the majority of unsecured creditors-outweighs the potential harm to any particular creditor. ***Id.*** Thus, when substantive consolidation is ordered, there is, in effect, a determination that the circumstances of the cases warrant consolidation and that the best interests of the unsecured creditors are served by joining the assets and liabilities of two or more debtors. ***Id.*** In this case, the Official Committee of Unsecured Creditors co-proposed consolidation, and the testimony and other proof overwhelmingly establishes that substantive consolidation is not only appropriate but necessary for the efficient reorganization.

Mr. Furlong and Mr. Mills testified very credibly and convincingly as to the need for substantive consolidation in this case. Those reasons included: (1) all of the company's cash is concentrated on the parent level which in turn pays all amounts due to the company's creditors; (2) the officers and directors of the subsidiaries are the same; (3) all subsidiaries are fully owned; (4) all contracts are entered into at the parent level; (5) all employees are hired and paid at the parent level; (6) financial tax statements and tax returns are done on a consolidated basis;[10] (7) the senior secured debt holders named only the parent company as obligor on the credit facility (with subsidiaries as guarantors); (8) the senior

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(showing employee numbers as of 3/7/03).

[10] The Lenders suggested that because the debtors are separate legal entities, have filed separate state tax returns and financial statements, engage in separate reporting to Medicare and Medicaid, and because assets and liabilities can be separated, that substantive consolidation is not appropriate. The court disagrees since this is done solely for tax reasons.

secured debt holders required only consolidated reporting in the past; and (9) substantive consolidation is consistent with the overall business operations of the debtor. Their testimony was credible, uncontradicted, and persuasive.

The court finds no attempt by the debtor to manipulate or otherwise gerrymander votes by substantively consolidating these cases. To the contrary, the court finds extremely credible Mr. Furlong's testimony that the debtor believes, in its best business judgment, that substantive consolidation will return the most to all creditors by pooling the assets and liabilities.[11] The court therefore overrules the Lenders' objections pursuant to 11 U.S.C. § 1129(a)(1), and orders that these debtors be substantively consolidated pursuant to the Second Amended Joint Plan.

C. Section 1129(a)(2)

Section 1129(a)(2) requires that: "the proponent of the plan complies with the applicable provisions of the title. The Lenders' specific objection relates to the debtor's failure to complete Schedules and Statements of Financial Affairs beyond referencing the parent company's Schedules and Statements of Financial Affairs.

The court overrules this objection in light of the substantive consolidation of these debtors and the lack of prejudice to any party.

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[11] The Lenders also argue that substantive consolidation is inappropriate because the debtor failed to perform any analysis of the return to creditors without substantive consolidation. The court will address these concerns in the "best interest of creditors" analysis contained herein.

D. Section 1129(a)(7) "Best Interest of Creditors" Test

Section 1129(a)(7) requires:

> (7) With respect to each impaired class of claims or interests–
>
> > (A) each holder of a claim or interest of such class–
> >
> > (i) has accepted the plan; or
> >
> > (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date;

11 U.S.C. § 1129(a)(7). In summary, the court must compare what the Lenders would receive upon liquidation to what it will receive under the plan. The proponent of the plan bears the burden of proof to show that this requirement is satisfied. ***See In re The Landing Assocs. Ltd.,*** 157 B.R. 791, 818 (Bankr. W.D. Tex. 1993); ***In re Future Energy Corp.,*** 83 B.R. 470, 489 (Bankr. S.D. Ohio 1988).

The debtor's experts and Mr. Furlong testified that the return to unsecured creditors would likely be less if the case were converted and liquidated in chapter 7. The likely recovery to unsecured creditors in chapter 7 would be reduced, at least in part, because: (1) significant additional administrative expenses would be incurred by such things as the hiring of new professionals; (2) a chapter 7 trustee would be required to expend additional time to "get up to speed" on

this case; (3) because the Lenders have a lien on substantially all of the debtor's assets, all proceeds would be paid to the Lenders except the $18,000,000 set aside in the cash collateral order to be paid to unsecured creditors; (4) conversion would likely result in the discontinuation of the company's business operations and destroy the current enterprise value of the business; and (5) conversion would most likely result in a further delay in payment to creditors thereby reducing the return to creditors.

The court finds that the debtor satisfied its burden of proof to show that the best interest of creditors test has been met. Although the Lenders assert that they would work with a chapter 7 trustee to sell the debtor's business as a going concern, the court finds that the debtor's proof of the many potential uncertainties following conversion would reduce any potential return to creditors. Because the debtor is proposing a 100% payment to all creditors and recovery in a chapter 7 is unknown or at the very least more speculative in this case, the court finds that this plan satisfies 1129(a)(7).[12]

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[12] The Lenders suggested that because no analysis occurred comparing the return to creditors without substantive consolidation, the plan does not meet the best interest of creditors test or is otherwise unconfirmable. The court has found that substantive consolidation is appropriate, and does not find that the absence of a specific analysis about the effect of substantive consolidation within the context of the best interest of creditors test precludes confirmation. The court found substantive consolidation appropriate after balancing the benefits and prejudices to all parties, and therefore determined the recovery to creditors is more favorable under the proposed plan with substantive consolidation than without substantive consolidation or a liquidation.

E. Improper Classification

The Lenders argue in their written objection to confirmation that the separate classification of Class 5 and Class 8 creditors is inappropriate and violates section 1122. Class 5 is the unsecured, deficiency claim of the Lenders, and Class 8 is the general unsecured claims. This court has held on numerous occasions that separate classification of unsecured claims with dissimilar interests is permissible. Classification of unsecured claims is measured by a flexible standard in the Sixth Circuit. ***See Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck),*** 800 F.2d 581, 586-87 (6th Cir. 1986); ***Bustop Shelters of Louisville, Inc. v. Classic Homes, Inc.,*** 914 F.2d 810, 813 (6th Cir.1990) (claim discrimination questions are committed to the bankruptcy court's discretion, reviewable only upon evidence of its abuse); ***In re Aztec,*** 107 B.R. 585, 587 (Bankr. M.D. Tenn. 1989); ***In re Creekstone Apartments Associates, L.P.*** 1995 WL588904, (M.D. Tenn. 1995). ***See also In re Jersey City Medical Ctr.,*** 817 F.2d 1055, 1061 (3rd Cir. 1987); ***Hanson v. First Bank of South Dakota,*** 828 F.2d 1310, 1313 (8th Cir. 1987); ***In re Mortgage Inv. Co. of El Paso,*** 111 B.R. 604, 613 (Bankr. W.D. Tex. 1990). ***But see Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture),*** 948 F.2d 134, 137-41 (5th Cir. 1991), ***vacated in part on reh'g per curiam*** (1992). Although abuse of the voting process through "creative" classification is prohibited, separate classification of unsecured claims with dissimilar attributes or interests is allowed. ***U.S. Truck,*** 800 F.2d at 586- 87.

The Lenders' objection pursuant to 11 U.S.C. § 1122 is overruled.

F. Section 1129(b)- Unfair Discrimination

The Lenders' also object that the plan unfairly discriminates by providing for separate payment schedules for Class 5 and Class 8 Claims. The Lenders contend that because the general trade creditors are getting paid more quickly than the deficiency unsecured claim, the plan unfairly discriminates. As noted by Judge Keith M. Lundin in ***In re Aztec Co.,*** 107 B.R. 585 (Bankr. M.D. Tenn. 1989) and ***In re Creekside Landing, Ltd.,*** 140 B.R. 713 (Bankr. M.D. Tenn. 1992), the Code permits discrimination, and prohibits only "unfair" discrimination.

Four factors commonly utilized in the determination of whether the discrimination is unfair are as follows: (1) whether the discrimination is supported by a reasonable basis, (2) whether the debtor can confirm and consummate a plan without the discrimination, (3) whether the discrimination is proposed in good faith, and (4) the treatment of the classes discriminated against. ***Aztec,*** 107 B.R. at 589.

After considering these factors, the court concludes that the plan does not unfairly discriminate against the Class 5 unsecured deficiency claim of the Lenders. The trade debt being paid faster is supported by the reasonable basis of continued good relations with the trade creditors, and the court finds the payment scheme is proposed in good faith.[13]

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[13] The Lenders objected to the admission of the testimony of Mr. Patrick Daugherty stating that his Lender (the Highland entities) acquired their total debt position at a discount of approximately $0.81 on the dollar. The court overruled that objection and allowed Mr. Daugherty to testify. The court found Mr. Daugherty's testimony to be highly credible. He testified as to the character of the Lender group's deficiency claim, and his

Finally, the debtor is proposing a 100% payment to both Class 5 and Class 8 and the court cannot find that slower payment of the 100% plan amounts to unfair discrimination.

The court overrules the Lenders' objections that the plan unfairly discriminates.

G. Feasibility

Section 1129(a)(11) requires:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed by the plan.

11 U.S.C. § 1129(a)(11). The Lenders argue that the debtor's plan is not feasible *IF* the Lenders' allowed secured claim is $290,000,000 rather than the $250,000,000 actually proposed by the Second Joint Amended Plan. The debtor offered proof as to the feasibility of the plan proposing a $250,000,000 note to the Lenders, and the court will therefore only rule on the feasibility of the plan proposed.

The primary thrust of the Lenders' feasibility objection is that the debtor's excess leverage is so outrageously high that there is no reasonable possibility of success pursuant to the

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testimony served as a guidepost to establish that the character of the Lenders' debt is clearly different from the general unsecured trade debt. This difference is further rationalization for differing payment schedules. The discount purchase of the debt, while relevant to show the differing character of claims, is not relevant to this court's decision to ultimately confirm or deny this chapter 11 plan.

plan. The debtor contends that given the restructured and reorganized operations within the business, the financial projections going forward are more than sufficient to handle the Lenders' claim, and that the plan is a realistic prospect for the successful reorganization of the business.

In ***In re Mallard Pond,*** 217 B.R. 782 (Bankr. M.D. Tenn. 1997) the Court set forth several factors to consider in determining feasibility:

> The test for feasibility entails an examination of several factors: (1) the adequacy of the [debtor's] capital structure; (2) the earning power of the [debtor's] business; (3) economic conditions [that the debtor will face during the plan period]; (4) the ability of [the debtor's present] management; (5) the probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

217 B.R. at 785 (quoting ***Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., Inc. (In re U.S. Truck Co., Inc.),*** 800 F.2d at 589 (6th Cir. 1986)). ***See also In re Rack Eng'g Co.,*** 200 B.R. 302, 305 (Bankr. W.D. Pa. 1996). As plan proponent, the debtor must prove the feasibility of the plan by a preponderance of the evidence. ***Danny Thomas Prop. II Ltd. P'ship v. Beal Bank, S.S.B. (In re Danny Thomas Prop. II Ltd. P'ship),*** 241 F.3d 959, 963 (8th Cir. 2001); ***Financial Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship),*** 116 F.3d 790, 801 (5th Cir. 1997).

The proponent of a plan of reorganization does not need to guarantee success, "but a court cannot confirm a visionary scheme that promises creditors more than the debtor can possibly attain after confirmation, 'notwithstanding the proponent's sincerity, honesty and willingness to make a best efforts attempt to perform according to the terms of the plan.'" ***In re Mallard Pond,*** 217 B.R. 782, 785 (quoting ***In re Rack Eng'g Co.,*** 200 B.R. 302, 305); ***In re Ridgewood Apartments of DeKalb County, Ltd.,*** 183 B.R. 784, 789 (Bankr. S.D. Ohio 1995) (does not require proof that meeting economic projections is certain, but financial projections must be based on realistic and reasonable assumptions capable of being met); ***In re IPC Atlanta Ltd. P'ship,*** 142 B.R. 547, 559-60 (Bankr. N.D. Ga. 1992) (Code does not require guarantee of successful reorganization, but the plan must offer a reasonable prospect of success); ***In re Lakeside Global II, Ltd.,*** 116 B.R. 499, 507-8 (Bankr. S.D. Tex. 1989) ("when financial realities do not support the projections or where the proponents' projections are unreasonable, the plan should not be confirmed").

Mr. Furlong provided truthful and extremely credible information about efforts made by the company to restructure its operations. He testified that: (1) the company has consolidated its billing centers (22 currently); (2) reduced the debt to the Lenders from a high of $400,000,000 to approximately $275,000,000 as of the petition date; (3) sold certain non-strategic assets post-petition that were not income-producing; (4) has, post-petition, built-up cash reserves; (5) has reduced accounts receivables by better collections; (6) improved DSO (Days Sales Outstanding); (7) lowered bad debt; and (8) met and exceeded post-petition financial goals. According to Mr. Furlong's testimony, the current management team has created stabilized revenues, improved margins, and instituted a solid corporate structure.

Specifically, with respect to the financial performance, debtor's Exhibit 6 demonstrates the recent financial improvements:

American HomePatient Financial Highlights (Millions)*

	12/31/99	12/31/00	12/31/01	12/31/02 **
Revenue	$ 357,580	$ 363,372	$ 352,501	$ 319,797
EBITDAR	$ 29,525	$ 48001	$ 50,147	$ 48,326
Cash	$ 28,123	$ 12,081	$ 9,159	$ 22,894
Accounts Receivable	$ 75,200	$ 74,500	$ 60,117	$ 55,437
Bank Debt	$ 311,165	$ 296,608	$ 283,508	$ 274,500
DSO	81	76	67	61
Bad Debt Expense	$ 35,729	$ 23,450	$ 15,813	$ 11,437
Bad Debt Expense (%)	10%	6.5%	4.5%	3.6%

* Actual results, revenue, and EBITDAR have not been adjusted to reflect asset sales. Revenues associated with asset sales occurring in 2001 and 2002 impacted revenues by $33,190,000.

** Includes all reclassification adjustments made for financial reporting purposes.

Exhibit 6 substantiates Mr. Furlong's testimony about the stabilization and growth of the business.

Mr. Thomas Mills, Chief Operating Officer, outlined some of the operational changes that have occurred at the debtor and the prospects going forward. He gave highly credible testimony that prospectively the changes at the company would amount to a successful chapter 11

reorganization. His testimony outlined such changes as: (1) restructured sales force (reduction in overall size); (2) a more trained, focused, and knowledgeable sales staff; (3) a two-week training program to initiate new sales staff, plus continuing sales education yearly; (4) sales staff numbers are growing; and (5) significant improvements in the billing practices and efficiency. Mr. Mills explained that the debtor, in conjunction with its financial professionals, has developed workable financial models to help control capital spending and growth assumptions. According to Mr. Mill's testimony, the debtor has exceeded its financial models.

The financial projections of the debtor for the future are realistic and attainable according to the testimony of Mr. Furlong. Exhibit 22, summarized in part here, sets forth the debtor's financial projections:

	1999A	2000A	2001A	2002A
Revenue	322,250	313,409	317,233	324,387
% Growth	n/a	-2.7%	1.2%	2.3%
EBITDA	48,842	44,103	48,608	48,477
% Margin	15.2	14.1	15.3	14.9
Cap. Expends.			(19,629)	(27,132)
Work Cap. Changes			1,660	14,753
Restr. & Settlmt. Exp			-	(6,135)
Other*			8,573	4,990
Cash Available for Debt Service			39,212	34,773
Cash Interest				
Existing Debt			(27,386)	(11,869)
Bank Debt				
Deficiency				
Unsec. Trade Debt				
Cash Available for Debt Amort.			11,826	22,904
Debt Summary				
Existing Debt			283,695	272,781
Bank Debt			-	-
Deficiency			-	-
Unsec. Trade Debt			-	-
Total Debt			283,695	272,781
Cash Balance			9,129	22,827

	2003P	2004P
Revenue	355,439	349,892
% Growth	3.4%	4.3%
EBITDA	47,366	53,865
% Margin	14.1	15.4
Cap. Expends.	(23,386)	(25, 260)
Work Cap. Changes	7,990	3,986
Restr. & Settlmt. Exp	(2,606)	(1,000)
Other*	(278)	(400)
Cash Available for Debt Service	39,212	34,773
Cash Interest		
Existing Debt	(56)	(49)
Bank Debt	(8,231)	(16,339)
Deficiency	(302)	(190)
Unsec. Trade Debt	(535)	
Cash Available for Debt Amort.	19,962	14,614
Debt Summary		
Existing Debt	2,026	2,026
Bank Debt	250,000	242,387
Deficiency	7,001	-
Unsec. Trade Debt	-	-
Total Debt	259,027	244,413
Cash Balance	7,000	7,000

	2005P	2006P
Revenue	365,232	381,554
% Growth	4.4%	4.5%
EBITDA	62,000	67,240
% Margin	17.0	17.6
Cap. Expends,	(27,244)	(29,350)
Work Cap. Changes	(1,267)	(1,178)
Restr. & Settlmt. Exp	(1,000)	(2,000)
Other*	(400)	(400)
Cash Available for Debt Service	32,089	34,311
Cash Interest		
Existing Debt	(49)	(49)
Bank Debt	(15,662)	(14,542)
Deficiency	-	-
Unsec. Trade Debt		
Cash Available for Debt Amort.	16,378	19,721
Debt Summary		
Existing Debt	2,026	2,026
Bank Debt	226,009	206,288
Deficiency	-	-
Unsec. Trade Debt	-	-
Total Debt	228,035	208,314
Cash Balance	7,000	7,000

	2007P	2008P
Revenue	398,922	417,410
% Growth	4.6%	4.6%
EBITDA	72,995	79,308
% Margin	18.3	19.0
Cap. Expends,	(31,586)	(33,960)
Work Cap. Changes	(1,256)	(1,339)
Restr. & Settlmt. Exp	-	-
Other*	(8,283)	(14,683)
Cash Available for Debt Service	31,871	29,327
Cash Interest		
Existing Debt	(49)	(49)
Bank Debt	(13,156)	(12,025)
Deficiency	-	-
Unsec. Trade Debt		
Cash Available for Debt Amort.	18,666	17,254
Debt Summary		
Existing Debt	2,026	2,026
Bank Debt	187,622	170,368
Deficiency	-	-
Unsec. Trade Debt	-	-
Total Debt	189,648	172,394
Cash Balance	7,000	7,000

	1999A	2000A	2001A	2002A
Mandatory Debt Amort. Exist Debt			(16,342)	(6,240)
Mandatory Debt Amort. Deficiency			-	-
Mandatory Debt Amort. Unsec. Trade			-	-
Cash Flow Sweep- Unsec. Trade			-	-
Cash Flow Sweep- Bank Debt			-	-
Total Amortization			(16,342)	(6,240)
Key Ratios				
Total Debt/LTM EBITDA			5.84x	5.63x
EBITDA/Cash Int. Exp.			1.77x	4.08x
EBITDA-CAPEX/ Cash Int. Exp.			1.06x	1.80x
EBITDA- CAPEX/ Cash Int. Exp + Mand. Debt			.066x	1.18x
Days Sales Outstanding (DSO)			74 days	62 days

	2003P	2004P
Mandatory Debt Amort. Exist Debt	(9,600)	-
Mandatory Debt Amort. Deficiency	-	-
Mandatory Debt Amort. Unsec. Trade	(3,285)	-
Cash Flow Sweep- Unsec. Trade	(4,104)	(7,001)
Cash Flow Sweep- Bank Debt	-	(7,613)
Total Amortization	(33,411)	(14,614)
Key Ratios		
Total Debt/LTM EBITDA	5.47x	4.54x
EBITDA/Cash Int. Exp.	5.19x	3.25x
EBITDA-CAPEX/ Cash Int. Exp.	2.63x	1.73x
EBITDA- CAPEX/ Cash Int. Exp + Mand. Debt	1.93x	1.73x
Days Sales Outstanding (DSO)	60 days	55 days

	2005P	2006P
Mandatory Debt Amort. Exist Debt	-	-
Mandatory Debt Amort. Deficiency	-	-
Mandatory Debt Amort. Unsec. Trade	-	-
Cash Flow Sweep- Unsec. Trade	-	-
Cash Flow Sweep- Bank Debt	-	(7,613)
Total Amortization	(16,378)	(19,721)
Key Ratios		
Total Debt/LTM EBITDA	3.68x	3.10x
EBITDA/Cash Int. Exp.	3.95x	4.61x
EBITDA-CAPEX/ Cash Int. Exp.	2.21x	2.60x
EBITDA- CAPEX/ Cash Int. Exp + Mand. Debt	2.21x	2.60x
Days Sales Outstanding (DSO)	55 days	55 days

	2007P	2008P
Mandatory Debt Amort. Exist Debt	-	-
Mandatory Debt Amort. Deficiency	-	-
Mandatory Debt Amort. Unsec. Trade	-	-
Cash Flow Sweep- Unsec. Trade	-	-
Cash Flow Sweep- Bank Debt	-	-
Total Amortization	(18,666)	(17,254)
Key Ratios		
Total Debt/LTM EBITDA	2.60x	2.17x
EBITDA/Cash Int. Exp.	5.53x	6.57x
EBITDA-CAPEX/ Cash Int. Exp.	3.14x	3.76x
EBITDA- CAPEX/ Cash Int. Exp + Mand. Debt	3.14x	3.76x
Days Sales Outstanding (DSO)	55 days	56 days

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* Other Includes taxes, equity in earnings, minority interest,

proceeds from sale of centers, distributions, proceeds from exercise of stock options, and deferred financing costs.

Mr. Furlong's testimony indicated that the projections are reasonable and realistic as such projections are only slightly better than the debtor's recent past performance.[14] Mr. Furlong testified that he was comfortable with the projections because the business is building steam and has strong growth potential in the future. According to Mr. Furlong, the debtor will be able to meet the reasonable financial projections under the proposed plan. Mr. David Sower, Treasurer of the debtor, likewise agreed. He testified credibly that the cash projections were very promising, and that the debtor will most likely meet or exceed all financial goals. Their testimony as to feasibility of the actual, hard numbers of the projections was unrebutted.

The Lenders do not quibble with the attainability of the financial projections of the debtor. Instead, they contend, that given the highly leveraged nature of the debtor's operations, and the $290,000,000 owed to the senior secured debt holders, that the debtor cannot generate enough cash to service the debt or pay down the principal. On these financial projections, the Lenders are correct if it is assumed that the Lenders secured debt is $290,000,000 and the interest rate to be paid is in excess of 12%. However, on the financial projections of the debtor in light of a $250,000,000 secured debt, at an approximately 6.85% interest rate, the debtor's plan is not only feasible, but reasonable.

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[14] Mr. Furlong explained that the debtor has even exceeded immediate past projections lending further credence to the realistic future financial projections.

The court, therefore, overrules the Lender's objection as to feasibility.

H. Section 1129(b) – Fair and Equitable (Valuation)

The Lenders believe that the going concern present value of the debtor's business is in excess of $300,000,000, not the $250,000,000 proposed in the debtor's plan. Both the debtor and the Lenders relied upon the testimony of expert witnesses to establish the proper valuation of the debtor's assets, and thus the secured portion of the Lenders' claim. Patrick Hurst[15] testified extremely credibly on behalf of the debtor, reaching the conclusion that the debtor's enterprise value fell between the range of $235,000,000 to $275,000,000. The Lenders

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[15] Patrick Hurst is the National Director of the Healthcare Investment Banking Group and Managing Director in the Chicago office of Houlihan Lokey Howard & Zukin. According to his Curriculum Vitae, (Exhibit 53), he has managed a wide variety of corporate finance and financial restructuring engagements in the healthcare industry. He has been involved in numerous transactions involving nursing homes, hospitals, managed care companies, home care agencies and other healthcare providers as well as medical product manufacturers. He is also involved in the firm's investment banking activities including private placements of debt and equity capital and structuring shareholder liquidity and other recapitalization transactions. Prior to his position with Houlihan Lokey Howard & Zukin, Mr. Hurst was a manager with Ernst & Young where he worked in valuations and bankruptcy groups. He was responsible for development of engagements at Arthur Young. Engagements included business enterprise and intellectual property valuations, workouts, preparations of plans of reorganization, liquidation and pre-acquisition feasibility analyses. and he also served as a Senior Consultant with Peterson & Company, Consulting.

called Mr. Gerald Benjamin[16] and Thomas C. Wylly[17], both

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[16] Gerald R. Benjamin serves as a Managing Director with Casas, Benjamin & White (LLC) were he directs the activities of the firm's Atlanta office, along with leading the firm's Distressed Mergers and Acquisitions Advisory Group. He is a certified public accountant, and has twenty years of forensic accounting, principal investing, corporate finance, restructuring and litigation support experience. Prior to joining Casas, Benjamin & White, he co-founded and served as CEO of Premier HeathCare, Inc., a healthcare services venture management and development firm. Prior to that Mr. Benjamin served as Managing Partner and Director of Corporate Finance for Williams, Benjamin, Benator & Libby, a 60-person Atlanta based CPA firm which Mr. Benjamin co-founded in 1982. He began his career as senior accountant at Ernst & Young in Atlanta. He has initiated, structured, and orchestrated in excess of $5 billion of merger, acquisition and corporate finance transactions.

[17] Thomas C. Wylly is a member of Brentwood Capital Advisors, a financial firm specializing in providing private placement and financial advisory services to middle-market companies. Prior to joining Brentwood Capital Advisors, Mr. Wylly served as the Co-Head of the Corporate Finance Department of J.C. Bradford & Company, the South's leading independent investment bank until its acquisition by Paine Webber in June 2000. Mr. Wylly was also a member of J.C. Bradford's Commitment Committee. Mr. Wylly directed over $4 billion in financings and merger assignments for emerging growth companies and firms executing consolidation strategies primarily in the healthcare services, business services, staffing and technology industries. In addition, Mr. Wylly organized, directed and served as lead presenter in seventeen workshops addressing over 500 private companies on the IPO and capital raising process. Prior to joining J.C. Bradford, Mr. Wylly was with Wachovia Bank and Trust as a Corporate Banking Officer responsible for middle and eastern Tennessee.

of whom decided that the correct valuation of the debtor and its assets is between $300,000,000 and $320,000,000. Given the differing valuation opinions of the experts, this court undertakes the task of considering all the competent evidence offered and to weigh such accordingly.

1. Valuation Methodologies Generally

"The valuation of property is an inexact science and whatever method is used will only be an approximation and variance of opinion by two individuals does not establish a mistake in either." ***Boyle v. Wells (In re Gustav Schaefer Co.),*** 103 F.2d 237, 242 (6th Cir.1939); ***see also Rushton v. Commissioner,*** 498 F.2d 88, 95 (5th Cir. 1974) ("Valuation outside the actual market place is inherently inexact."); ***In re Montgomery Court Apartments of Ingham County, Ltd.,*** 141 B.R. 324, 337 (Bankr. S.D. Ohio 1992) ("Valuations of real property, like projections of income and expenses, are inherently imprecise. Opinions realistically may differ, depending upon the method of valuation used and the nature of assumptions adopted."); ***In re Jones,*** 5 B.R. 736, 738 (Bankr. E.D. Va. 1980) ("True value is an elusive Pimpernel.").

Because the valuation process often involves the analysis of conflicting appraisal testimony, a court must necessarily assign weight to the opinion testimony received based on its view of the qualifications and credibility of the parties' expert witnesses. ***See In re Coates,*** 180 B.R. 110, 112 (Bankr. D.S.C. 1995) ("The valuation process is not an exact science, and the court must allocate varying degrees of weight depending upon the court's opinion of the credibility of ... [the appraisal] evidence."). As noted by the Bankruptcy Court for the Southern District of Ohio in ***In re Smith*** 267 B.R. 568, 572-573 (Bankr. S.D. Ohio 2001), when "weighing

conflicting appraisal testimony, courts generally evaluate a number of factors, including: ... the appraiser's education, training, experience, familiarity with the subject of the appraisal, manner of conducting the appraisal, testimony on direct examination, testimony on cross-examination, and overall ability to substantiate the basis for the valuation presented." ***Id.*** (internal citations omitted). A bankruptcy court is not bound to accept the values contained in the parties' appraisals; rather, it may form its own opinion considering the appraisals and expert testimony. ***Id.*** at 573; ***see, e.g., In re Abruzzo,*** 249 B.R. 78, 86 (Bankr. E.D. Pa. 2000) ("I am left to some extent with the proverbial battle of the appraisers. Finding merit to both their positions, the only conclusion I can reach is to find some value in between.")

In this case, the methodologies employed for valuation of the debtor and its assets are the same. The three generally accepted approaches are the: (1) Market Comparison Approach; (2) Comparable Transaction Approach; and (3) Discounted Cash Flow Approach. The court's role is to compare the application of these generally accepted approaches by these experts and to determine the most accurate valuation of the debtor as a going concern.

2. The Market Comparison Approach

Houlihan Lokey Howard & Zukin (hereinafter "HLHZ") defines the market comparison approach as follows:

> The Market Comparison Approach is one of determining a level of earnings which is considered to be representative of the future performance of the company, and capitalizing this figure by an appropriate risk-adjusted rate. This approach provides an indication of value for the security which

corresponds with the particular earnings figure being capitalized.

Exhibit 57, page 3. Mr. Patrick Hurst's market approach utilized 2002 EBITDA as representative levels of earnings, and assumed a multiple of 5.0x to 5.5x.[18] Mr. Hurst testified that with respect to the 2002 EBITDA figure of $ 46,557, that certain non-recurring expenses were deducted and that the figure was consistent with 2003 EDITBA projections. To arrive at the multiple, Mr. Hurst explained that public market multiples for health care companies are figured based upon both a minority and controlling interest basis, and then used to determine the multiple appropriate for the debtor. Of the companies selected for the market comparison approach, the median multiple (excluding hospice companies) was 6.7x and the average was 8.3x. Focusing on the three distribution companies that were most similar to American HomePatient's business (Apria, Lincare, and Rotech), the average multiple was 8.6x. The Control Premium used was 40%.[19]

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[18] A market multiple is an expression of what investors believe to be a fair and reasonable rate of return for the particular security, given the inherent risks of ownership. It incorporates expectations of growth and rests on the implicit assumption that some level of earnings will be generated by the enterprise into perpetuity. **Exhibit 57,** page 3. Generally a multiple is an expression of Enterprise Value / EBITDA or Enterprise Value / EBIT or Enterprise Value / Revenue. The multiple is expressed in these calculations as Enterprise Value / EBITDA.

[19] The Control Premium is a measure of the difference in value between a controlling interest in a company and a minority interest and can be found in successful public tender offers where the investor acquired a control position. The control premium was based upon an analysis of transactions involving controlling interests in publicly traded healthcare service companies from

Based upon the market comparison, Mr. Hurst then selected a multiple range appropriate to American Home Patient of 5.0x to 5.5x. He explained that the range was lower than Apria's and Rotech's multiple, in part, because those are much stronger companies and growing faster. Rotech is the company Mr. Hurst felt was most closely analogous to the debtor. Its minority EV/EBITDA multiple was 5.5x and control EV/EBITDA multiple was 6.5x. Based upon his expertise, Mr. Hurst felt that the 5.0x to 5.5x was the appropriate range for the debtor.

After establishing the correct multiple range, he multiplied the debtor's representative levels (2002 EBITDA of $46,577,000) times the multiple range (5.0x to 5.5x) and arrived at a market comparison valuation of AmericanHome Patient of $230,000,000 to $260,000,000.

Mr. Benjamin made the same analysis. His conclusions were that based upon the companies he selected, which likewise included Apria, Lincare, and Rotech, that the minority EV/EBITDA average multiple was 6.1x and the control EV/EBITDA average multiple was 8.7x. The median EV/EBITDA multiple for minority interests was 5.6x and for control interests was 7.2x. Mr. Benjamin's selected control premium was 50%. Mr. Benjamin used the same 2002 EBITDA results as his representative earnings, but selected an appropriate multiple range for American HomePatient of 6.0x to 6.5x. When that mathematical equation is computed (Representative Earnings x Multiple), the resulting valuation

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January 1, 2000 to March 31, 2003. Mr. Hurst concluded that the 30-day control premiums had an average of 51.3% and a median of 50.6%. Mr. Hurst testified that based upon his experience and the number of valuations performed, he then assigned a control premium of 40% to the debtor.

under the market comparison approach, according to Mr. Benjamin's testimony and report, is $285,000,000 to $309,000,000.

3. Comparable Transaction Approach

This approach looks to companies that have recently been sold in arms-length, public transactions. The total price paid for the business is defined in relation to the earnings to yield a transaction multiple. **See Exhibit 57,** page 4. Both HLHZ and Casas, Benjamin & White (hereinafter "CBW") utilized this approach both as an independent means of valuation and as a check as to the accuracy of their other methods of valuation.

Mr. Hurst compared transactions occurring in the healthcare sector of the market place, and the debtor's prepetition, 2001 attempt to sell the business in the market place. In the comparable transactions, the multiples for the comparable companies had a median of 7.2x and an average of 6.7x, and an overall range of 2.5x to 9.9x. Mr. Hurst then analyzed the sale process initiated by the debtor through MTS Health Partners during the fourth quarter of 2001.. The resulting bids on assumed 2001 EBITDA of $50.3 million and $40 million produced an average estimated value of $236,000,000 to $254,000,000 and an average multiple range of 5.9x to 6.4x on assumed 2001 EBITDA of $40,000,000 and an average multiple range of 4.7x to 5.1x on assumed 2001 EBITDA of $50,000,000. Based on the comparison of comparable transactions and the market, and the 2001 sale process, Mr. Hurst concluded that the appropriate multiple for American HomePatient was 5.0x to 5.5x resulting in a comparable transaction valuation of $230,000,000 to $260,000,000.

Mr. Benjamin examined the comparable transactions of

various sales from 1997 to 2003. He determined that the average multiple was 8.0x and the median was 7.3x. He also considered the 2001 sale offering by American HomePatient, but he based his multiple range on 2002 EBITDA of $47.5 million resulting in an average implied value of $280,400,00 to $303,000,000 and an average multiple of 5.9x to 6.4x. He concluded that based upon his analysis of the similar transactions and implied values of his sales solicitation analysis, that the appropriate multiple range for the debtor was 6.25x to 6.75x thereby producing a comparable transaction value of $297,000,000 to $333,000,000 for American HomePatient, Inc.

4. Discounted Cash Flow Analysis

The Discounted Cash Flow Analysis estimates the present value of projected future cash flow of the business that is hypothetically available to creditors but not paid to them, and then applies a discount rate to projected future cash flows to determine a present value of the company. The discount rate is the rate of return to a provider of capital to compensate for the time value of their money and the risk inherent in the investment of their money. Both HLHZ and CBW used a weighted average cost of capital (hereinafter "WACC") to determine the appropriate discount rate.[20]

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[20] The Weighted Average Cost of Capital "is an average of the costs of all sources of capital (debt, preferred and common equity, etc.) for the subject company, with each source weighted by its respective percentage share in the capital structure." **Exhibit 57,** page 7.

Mr. Hurst testified that he used the projected cash flows, as proposed by the Second Joint Amended Plan, applying a WACC range of 12.0% to 13.0%. Mr. Hurst explained the precise mathematical calculations to arrive at this figure,[21] but the most important part of his WACC calculation is that he assumed a debt to enterprise value of 25% and equity to enterprise value of 75% based on a comparison of similar businesses.

Based upon the 12.5% WACC, Mr. Hurst applied the discount rate to the financial projections and arrived at a DCF Analysis Approach Value of $250,000,000 to $290,000,000.

Mr. Benjamin used financial figures for the 12/19/02 financial model of American HomePatient, Inc., which contained similar numbers to the projections in the Second Joint Amended Plan that Mr. Hurst used in his analysis. Mr. Benjamin determined the WACC at 12.16% based upon the

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[21] The cost of equity (what the holder of common stock would expect for a return on investment) is usually determined with respect to the capital asset pricing model ("CAPM"). The formula used to express the cost of equity is as follows:

> Cost of Equity = Risk Free Rate + (Beta x Equity Risk Premium) + Size of Risk

In this instance, Mr. Hurst calculated the cost of equity as 15.3%. He then used that figure to arrive at the WACC by the following formula:

> WACC=(Cost of Debt x (1- Tax Rate) x Debt to EV) + (Cost of Equity x Equity/EV)

The result is that the WACC amounts to 12.5%.

current market capital structure of this debtor. In other words, he computed the cost of capital in the market place for this debtor based upon the secured debt, necessary mezzanine, and equity financing to arrive at his WACC.[22] Mr. Benjamin's results were that based upon the Discounted Cash Flow Analysis, the appropriate valuation range is between $337,000,000 and $357,000,000.[23]

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[22] Mr. Benjamin assumed the following based upon 2002 EBITDA of $ 47,530,000:

Capital Structure (millions)	**Assumed Amount**	**Assumed Rate**	**Weigh Adj. Rate**
Senior Debt (LIBOR + 400 basis points)	104,566	5.24%	1.83%
Mezzanine (High Yield = lack of marketability premium)	42,777	12.50%	1.78%
Equity (Cost of Equity Calculation)	152,657	16.81%	8.55%

Based Upon an Indicated Capital Structure of $300,000,000 (not the $250,000,000 assumed by the Second Joint Amended Plan).

The composite WACC is 12.16%. The cost of equity calculation is based upon the same calculations utilized by Mr. Hurst. Mr. Benjamin's cost of equity amounts to 16.81% whereas Mr. Hurst's cost of equity calculation was 15.3%.

[23] Mr. Hurst did not include the value of the Net Operating Loss ("NOL") in the valuation calculations based in part upon his expertise as a financial expert, and because he believed the NOL would not be available "under a change of control." Mr. Benjamin disagreed with this assessment and included the value of the NOL in his valuation calculations. He testified that with some "basic" tax planning, the debtor could sell up to $70,000,000 of fully depreciated assets and replace those with similarly used equipment to take the depreciation on the replacement assets. Mr. Benjamin

5. The Results of the Experts[24]

The reconciled numbers for Mr. Hurst and Mr. Benjamin compared as follows:

	Mr. Hurst	Mr. Benjamin
Market Comparison	$ 230,000	$ 285,000
	to $ 260,000	to $ 309,000
Comparable Transaction	$ 250,000	$ 297,000
	to $ 290,000	to $ 333,000
Discounted Cash Flow	$ 230,000	$ 337,000
	to $ 260,000	to $ 357,000
Selected Enterprise Value	$ 235,000	$ 300,000
	to $ 270,000	to $ 320,000

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also prepared a Discounted Cash Flow valuation without the NOL and his indicated enterprise value range was $314,577,000 to $334,291,000.

[24] The Lenders also relied upon the expert testimony of Mr. Thomas Wylly to provide an expert opinion on valuation. Mr. Wylly wrote in his expert report that "generally, [he] agrees with the range of enterprise values from $300.0 million to $320.0 million established by CBW, assuming the fiscal year normalized earnings before interest, taxes, depreciation and amortization ("EBITDA") is approximately $47.5 million." Although Mr. Wylly was a credible witness, his testimony was based upon a review of the work of Mr. Benjamin and his staff, rather than upon an independent analysis performed by Mr. Wylly. He states that this report is based upon the CBW analysis. ("Based on the comparable public company analysis performed by CBW ... [and] Based on the comparable transaction analysis performed by CBW, ... [and] In reviewing the discounted cash flow analysis ..."). Given the flaws this court found with Mr. Benjamin's testimony and analysis, Mr. Wylly's testimony does nothing to buttress an already weak report.

Based on the testimony of Mr. Hurst and Mr. Benjamin, and in conjunction with all of the other evidence, the court must decide the appropriate valuation. It is a difficult task to choose between competing expert appraisals, and courts generally consider such factors as: (1) the appraiser's education, (2) training, (3) experience, (4) familiarity with the subject of the appraisal, (5) manner of conducting the appraisal, (6) testimony on direct examination, (6) testimony on cross-examination, and (7) overall ability to substantiate the basis for the valuation presented. An evaluation of these factors demonstrates why the court finds Mr. Hurst the more credible, reliable, and persuasive expert witness:

Factors:	**Mr. Hurst**	**Mr. Benjamin**
Education	Univ. of Wisconsin-Madison, Masters in Business Admin., B.S, Marquette Univ.	Univ. of Kentucky, B.S
Training	Equal	Equal
Experience	See Footnote 15	See Footnote 16
Manner of Appraisal	Equal	Equal
Testimony on direct Examination	Clear, concise, convincing, unbiased, well-substantiated, professional, understandable	Difficult to follow, at times contradictory, lengthy narrative answers that exceeded scope of question, referred to his testimony as if he and the Lenders

Factors:	**Mr. Hurst**	**Mr. Benjamin**
		are of the same alignment ("we just don't buy that"), contained mistakes within the report, unable to convincingly attack Mr. Hurst's conclusions.
Testimony on cross-Examination	Admitted that valuation not exact science, and that many of his conclusions were based on assumptions based on his professional experience, very strong testimony that held up well under cross.	Unable to concede points when he was incorrect, unable to substantiate his own valuation and assumptions under questioning, unable to support his criticisms of Mr. Hurst's opinion and testimony.

Factors:	**Mr. Hurst**	**Mr. Benjamin**
Overall ability to substantiate basis valuation	Could reasonably, convincingly, and clearly sustain his expert opinion and able to explain any apparent inconsistencies, Highly credible witness.	Unable to substantiate his overall results.[25] Cross examination revealed the inconsistencies of his assumptions and at times the contradictory nature of testimony. Although witness was clearly knowledgeable of his industry, his testimony was not clear, not convincing and obviously weaker and less credible than Mr. Hurst's testimony

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[25] Some illustrative examples of the inconsistencies or problems with Mr. Benjamin's testimony include, but are by no means limited to: (1) did not use the audited financial data to prepare his report; (2) his original comparable transaction report contained a sale that had not yet closed; (3) his original comparable transaction analysis contained nine companies, and his "replacement" comparable transaction company then dropped three of the original transactions considered and added four new companies, but the overall result of his valuation did not change; (4) he could not provide credible testimony to support his multiple assumptions in the market comparison approach; (5) he could not provide credible

After weighing all of these factors and the proof as a whole, the court unquestionably finds Mr. Hurst's testimony more persuasive, credible, reliable, understandable and more sustainable. Mr. Hurst has performed or been involved in over 1000 valuations during his career. He has been hired by debtors, unsecured creditors, and lenders and has represented varied and often competing interests. Mr. Benjamin, on the other hand, has represented both debtors and creditors in private placements, but has never testified as an expert for any party other than secured lenders. In fact, his continuous referral during his testimony to "we" to include himself in the Lenders' camp gave the appearance that he was in fact of similar interest.

Based upon the court's conclusion that Mr. Hurst was the more credible expert witness, the court finds that the debtor's valuation of $ 250,000,000 is correct. Accordingly, the Lenders' objection based on valuation is overruled.

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testimony about why the control premium should be 50%; (6) he seemed to use whatever financial projections or financial data would provide the worst result for the debtor instead of consistently using the same financial information as Mr. Hurst did; (7) at times he calculated figures based upon the default rate of interest in the debtor's credit facility, even though it was stipulated to in the Cash Collateral Order that the debtor was not in default at the time of filing; (8) he was unable to substantiate why his WACC rate should be used instead of the WACC rate reached by Mr. Hurst; (9) he did not use the "Gordon Growth Approach" to substantiate his findings as Mr. Hurst did in the Discounted Cash Flow Analysis; and (10) he could not provide clear answers to some of the criticisms regarding his assumptions which based upon his experience as an expert.

I. Section 1129(b) - Fair and Equitable (Interest Rate to Secured Claims)

The Lenders argue that even if the valuation of the debtor, and hence their secured claims, is $250,000,000, the plan is nonetheless unconfirmable because it does not provide an appropriate rate of interest to afford the Lenders with the present value of their secured claim. Section 1129(b)(2)(A)(i) provides that a plan is fair and equitable with respect to a class of secured claims if, *inter alia,* each holder of a secured claim retains its lien and receives deferred cash payments with a present value as of the effective date of the plan of not less than its allowed secured claim. The heart of the Lenders' objection is that the interest rate proposed by the debtor is not sufficient.

The Lenders' argument is not a new one, but is novel in the sense that they argue that a market does exist to provide this debtor with a new loan, and therefore any application of a "coerced loan theory" to reach a contrived rate is inappropriate, and inconsistent with the law. The debtor argues that the coerced loan theory is exactly the theory to be applied in this case, and that the interest rate provided for in the plan provides the Lenders with the present value of their claims. Unlike most interest rate disagreements in the context of confirmation, the dispute is more over how to set the appropriate interest rate rather than both expert witnesses using the same theory to arrive at different interest rates, and asking the court to chose the rate that provides present value.

The Lenders argue that the Second Joint Amended Plan's proposed interest rate[26] does not provide present value

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[26] Six Year Treasury Note plus 350 basis points.

because: (1) it was computed without regard to the capital structure of the debtor; (2) the debtor's risk profile was deliberately ignored; and (3) unlike other lending situations in chapter 11, a market exists for this type of loan – a blended rate based on the senior debt component, mezzanine unsecured lending, and an equity component. The Lenders contend that if this were a true market place lending situation, the debtor would pay a blended interest rate of at least 12.16%. The Lenders relied upon the expert testimony of Mr. Gerald Benjamin and Mr. Thomas Wylly.

The debtor contends that the six-year Treasury Note, plus 350 basis points to compensate the Lenders for their risk provides the Lenders with the present value of their claims. The debtor reached this interest rate calculation under the "coerced loan theory" as supported by the law of this Circuit, and based upon the rate of return to the Lenders prior to bankruptcy. The debtor relied upon the expert testimony of Mr. David Rosen of HLHZ.[27]

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[27] Mr. Rosen is the Regional Leader of Distressed M&A and a Senior Vice President in the Chicago office of Houlihan Lokey Howard & Zukin. Mr. Rosen specializes in advising clients in financial restructurings and distressed mergers and acquisitions. He has managed a variety of restructurings engagements across multiple industries. Prior to his job at Houlihan Lokey Howard & Zukin, Mr. Rosen co-founded Dakota Capital Partners, LLC, a firm making investments in small to middle market services and industrial companies. Before that, Mr. Rosen was a principal investor with Equity Group Investments, LLC, where he structured bank and mezzanine debt financings for portfolio companies, assisted in add-on acquisitions, and served on the board of directors. He was also a partner at Zell/Chilmark Fund, L.P. **Exhibit 63.**

The court is asked to decide, not just which expert provided more credible testimony as to the appropriate interest rate to provide present value, but also to choose between the correct theory to establish that rate. The court finds that the "coerced loan theory" is indeed appropriate to determine the interest rate to provide the Lenders with the present value of their claims, and that based upon the credible testimony of Mr. Rosen, the rate proposed by the debtor does provide present value.

1. The "Coerced Loan" Theory

The Sixth Circuit has long recognized the "coerced loan" theory to determine interest rates in a cramdown confirmation. ***See Memphis Bank & Trust Co. v. Whitman,*** 692 F.2d 427 (6th Cir. 1982). Under this theory, as explained by the court in ***Whitman;***

> [B]ankruptcy courts should use the current market rates of interest used for similar loans in the region. Bankruptcy courts are generally familiar with the current conventional rates on various types of consumer loans. And where parties dispute the question, proof can easily be adduced.
>
> The reason we do not use an arbitrary rate is that such rate may vary widely from the current market rate. The theory of the statute is that the creditor is making a new loan to the debtor in the amount of the current value of the collateral. Under this theory, the most appropriate interest rate is the current market rate for similar loans at the time the new loan is made, not some unrelated arbitrary rate.

Whitman, 692 F.2d at 431; ***see also U.S. v. Arnold,*** 878 F.2d 925 (6th Cir. 1989) (when a creditor is forced to "write-down a portion of its note, a creditor is entitled to receive its current market rate on the 'new loan.'"); ***In re Johnson,*** 35 B.R. 54 (Bankr. M.D. Tenn. 1983) (adopting ***Whitman); In re Memphis Partners, L.P.,*** 99 B.R.385 (Bankr. M.D. Tenn. 1989) ("forced nature of the loan may warrant an additional premium to insure present value. ***Whitman,*** however, indicates that this court should use readily available market rates ...."). ***In re Memphis Partners, L.P.,*** 99 B.R. 385 (Bankr. M.D. Tenn. 1989) ("Both the debtor's expert and the expert offered by FHLMC explained that real estate mortgages are priced by lenders as percentage points over the rate for treasury bills of a maturity approximating the length of the loan (here 10 years because of the 10-year call provision in the debtor's amended plan). The percentage added on- the number of basis points added by the lender- reflects many factors including the lender's evaluation of the risk involved in this loan, the lender's cost of funds, the lender's best guess about the future of the mortgage market, the internal rates of return required by a particular lender, the administrative expenses of managing this loan and the rest of the lender's portfolio and the availability of 'product.' The experts disagreed what percentage above the applicable treasury bill would best reflect the (nonexistent) market for this loan.")

Mr. David Rosen testified that although he was unfamiliar with the "coerced loan theory" prior to his engagement by the debtor, he has reviewed the relevant case law, and understands the theory.[28] Based on his expertise, he then

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[28] A Memorandum written by debtor's attorney outlining the differing methods courts use to calculate interest rates, was given to Mr. Rosen, Mr. Hurst, and Greg Miller (all of HLHZ). It was

applied the coerced loan theory to the current situation of the debtor. His report provides that:

> Based on the analysis of ... newly issued non-investment grade healthcare company bank debt (issued between January 1, 2002 and March 1, 2003) and ... the interest rates on the senior debt of healthcare companies with $200 million to $1 billion in revenue and at least $50 million in debt as indicated in the companies' most recent 10-K's, we estimate that the appropriate spread for amortizing debt over LIBOR/Treasuries would be 300 basis points. Based on ... the differential in spreads over risk-free rates on BBB-rated amortizing bank debt versus BBB non-amortizing bonds, and consultation with Houlihan's private debt placement personnel ... we estimated that an additional 50 basis points should be added to account for the lack of amortizing of the debt for a total of 350 basis points over LIBOR/Treasuries.

Exhibit 64. According to Mr. Rosen's testimony, the

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in this Memorandum, dated October 25, 2002, that Mr. Rosen became acquainted with the "coerced loan theory." The Lenders objected because the debtor did not turn over the Memorandum during general discovery. The debtor argued that the Memorandum was covered by attorney-client or work-product doctrines. The Lenders filed a motion to compel turnover, and the debtor complied turning over the Memorandum just prior to the confirmation hearing. The Lenders argued that they were prejudiced by the late turnover of the Memorandum, and the court gave the Lenders the opportunity after examination of witnesses to explain how they had been prejudiced by the late turnover of a Memorandum that did no more than outline the different legal theories of calculating interest rates. The Lenders were unable to show any prejudice to this court.

appropriate interest rate to provide the Lenders with the present value of their claims is the six-year Treasury Bill (because of the 6 year term of the loan), plus 350 additional basis points. At confirmation, this equated to a rate of approximately 6.8%.

2. The Weighted Average Cost of Capital ("WACC") Theory

The Lenders relied upon the expert testimony of Mr. Benjamin and Mr. Wylly concerning the appropriate interest rate to be applied to return present value to the Lenders' claims. Mr. Benjamin's expert report provided the following:

> The capital markets have not, and will not provide for the retention of 100% of a loan in the amounts similar to the financing needs of the Company by a single bank or non-bank lender. Rather senior debt provided to a healthcare company in amounts similar to the financing needs of the Company is always syndicated on a national basis or funded by a national "club" of lenders. No local or national financier is prepared to hold such a concentration of risk on its balance sheet.
>
> It is not feasible, using conventional financing sources, to provide the $309 million in financing needed by the Company with 100% debt. There is, however, an established market that can provide financing of $309 million to the Company. This market would provide a combination of senior debt, mezzanine debt, and equity, with resulting yields priced in response to the inherent risks assumed by the holders of such instruments. The resulting composite yield necessary to finance the Company's financing needs exceeds 12.16%.

Exhibit 61, pp. 2-3. Mr. Benjamin testified that he arrived at the 12.16% figure based upon his WACC calculations and the debtor's 2002 financial year EBITDA. In other words, Mr. Benjamin assumed a senior secured claim of $290,000,000. Of that figure, $104,566,000 is senior debt. Senior debt would receive the present value of its claim with an assumed rate of 5.24%. Mr. Benjamin then assigned a rate of 12.5% to the mezzanine debt of $42,777,000 to provide present value of that portion of the claim. Finally, the equity component consists of $152,657,000, which Mr. Benjamin explained would receive a 16.81% interest rate to provide present value to the claim. He then calculated the blended rate of 12.16% based on the weighted average cost of capital. Mr. Benjamin testified that because a market does exist for this type of financing, the debtor's proposed rate of return of approximately 6.8% does not provide the Lenders with the present value of their claims. It was his assessment that the interest rate proposed by the debtor would only be appropriate if the debtor were substantially less leveraged.

Mr. Thomas Wylly's expert report also applied a WACC approach and provided as follows:

> Based on the capital structure outlined above and the Company's LTM EBITDA, it is my opinion that the Company's weighted average cost of capital, or composite rate of return, would be approximately 12.0% based on the collateral value of the Secured Lenders of $290 million and the following capital structure.
>
> i. Senior debt of 2.5x LTM EBITDA, or $118.8 million, with a cost of capital of approximately 5.25% (LIBOR plus 4.00%)

ii. Subordinated debt of 1.0x of LTM EBITDA, or $47.5 million, with a cost of capital of approximately 16.00%; and

iii. Equity providing the excess capital necessary to recapitalize the Company based on the collateral value of the Secured Lenders of $290.0 million, or $123.6 million.

Exhibit 105. Applying the WACC approach, Mr. Wylly testified that the overall, blended interest rate would have to be 12.0%, assuming $290,000,000 in senior secured debt, to provide the Lenders with the present value of their claim.[29]

3. Conclusions As to Credibility and Theory

The determination of the appropriate interest rate for the Class 2 claims depends both upon the court's determination of credibility and application of legal theories. The court will first address the coerced loan theory, and then the credibility of the witnesses.

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[29] Both Mr. Benjamin and Mr. Wylly assumed secured debt of $290,000,000 for purposes of their interest rate analyses. However, in the event that the court valued the secured claim at $250,000,000, Mr. Benjamin testified that the appropriate interest rate would be 11.23%, and Mr. Wylly's report indicates a rate of 11.2% based on the $250,000,000 valuation.

(a) Coerced Loan Theory in This Case

Almost all courts agree that the "market" rate of interest should apply to set the cramdown interest rate. What courts do not agree upon is how to set the "market" rate. One approach, commonly called the "cost of funds" method, allows the interest rate to be set at the rate the creditor would have to pay to borrow the amount equal to the collateral's value. ***See e.g., In re Valenti,*** 105 F.3d 55 (2nd Cir. 1997) (expressing view that this approach best provides present value of claim but because it is difficult to administer, chose to use a fixed rate on a United States Treasury with a maturity equal to repayment schedule). Another method is the "formula approach" which is really a variation of the cost of funds analysis. Under the "formula approach," which has been used by the Second, Eighth, and Ninth Circuit, the court adopts a risk-free market as a base, and then adds a risk premium corresponding to the court's determination of the riskiness of the reorganization plan. ***See e.g. Valenti,*** 105 F.3d at 64; ***In re Fowler,*** 903 F.2d 694 (9th Cir. 1990). A third method is "coerced loan" approach. Under this approach, courts envision the cramdown provision as forcing the creditors to extend a new line of credit to the debtor. ***See e.g., United States v. Arnold,*** 878 F.2d 925.

The Sixth Circuit has time and time again upheld the "coerced loan" theory in the context of a cramdown confirmation. As recently as last month, the Sixth Circuit affirmed the bankruptcy court's decision to apply the "coerced loan theory" in the context of subprime financing on a consumer car loan in a chapter 13. ***Household Auto. Fin. Corp. v. Burden (In re Kidd),*** 315 F.3d 671 (6th Cir. 2003). In that case, the lender was a subprime lender. and the

debtors were paying an interest rate of 20.95%.[30] In their cramdown, chapter 13 plan, they proposed an interest rate of 8%. The proof indicated that given the poor credit history of the debtors, they would be offered an interest rate of no less than 20.95% in the current market. ***Id.*** at 673.

The court again reaffirmed its holding in ***Whitman,*** and specifically rejected the lender's argument that the appropriate rate of interest should be the higher contract rate of 20.95%. The court found that:

> Hence, in ***Memphis Bank & Trust*** we concluded "that current market rates of interest would best approximate the present value of a secured claim." Thus, payment of that amount and that amount alone satisfies the purpose of the cram down provisions. In fact, "to permit a secured creditor to receive interest on his claim in an amount greater than the conventional market rates would allow the creditor to actually receive more than the allowed amount of his secured claim."

Kidd, 315 F. 3d at 677. The court explained that when it said in ***Whitman*** that bankruptcy courts are generally familiar with

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[30] The Sixth Circuit defined a subprime lender as a lender who "offered loans to individuals whose past credit problems or lack of positive credit history made them unattractive customers for banks, credit unions, and other 'prime' lenders. Due to the higher risk of non-payment from those borrowers, ... subprime lenders usually charged higher rates of interest on their loans, ranging from 20.95% to 24.95% for automobile loans." ***Kidd,*** 315 F.3d at 673.

The similarities between the subprime lender and the secondary lenders for American HomePatient's market are inescapable.

"conventional rates," it was directing the use of "more generally applicable rates" and not loan-specific rates. ***Id.***

Even in the context of a subprime rate, the Sixth Circuit affirmed the bankruptcy court's decision to consider the conventional rates, and set a rate of 10.3% to provide present value to the secured lender. The court concluded definitively that "the principles of valuation espoused in the case of ***Memphis Bank & Trust Co. v. Whitman*** constitute the law of the circuit and are entitled to precedential deference." ***Kidd,*** 315 F.3d at 678.

In this context, it is argued by the Lenders that a market does exist for this debtor to obtain the financing it needs, and therefore, it is unnecessary to "coerce" a new loan that will produce an artificial rate because of the debtor's bankruptcy. While it may be true that a market exists, just as it was true that a subprime lender market existed in ***Kidd,*** the court is to consider "more generally applicable rates" and not loan-specific rates. The debtor argues that after considering more generally applicable rates, the six-year Treasury Bill plus 350 basis points represents a more generally applicable rate. The Lenders, however, assert that the market rate is 12.16% based on the WACC calculation, and that this calculation does comport with applicable law because it provides present value to the Lenders.

The court disagrees with the Lenders. An interest rate of 12.16% results in a windfall to the Lenders. Prior to bankruptcy on May 25, 2001, the debtor and the Lenders renegotiated the credit facility, and the interest rate *agreed* upon by the parties to compensate the Lenders was LIBOR + 350 basis points, plus an additional 4.5% (whenever leverage

was 4 times or more greater than EBITDA).[31] Prepetition, this amounted to an interest rate of approximately 6.5%, which *included* the excess leverage charge of approximately 4.5%. Thus, the parties negotiated a provision into the Fifth Amended and Restated Credit Agreement dated May 25, 2001 to compensate the Lenders for any excess leverage. ***See*** **Fifth Amended and Restated Credit Agreement, May 25, 2001,** Section 2.03(g) "Additional Interest," p. 24. Furthermore, Mr. Furlong's extremely credible and uncontradicted testimony was that this interest rate was similar to all previously negotiated interest rates under all previous credit facilities.

The Lenders are not entitled to a premium on their return because the debtor filed for bankruptcy. The blended rate suggested by the Lenders goes beyond protecting the value of its claim from dilution caused by the delay in payment. "No sound legal or policy argument can be advanced ... for increasing the discount factor because the debtor is a debtor ..." ***In re Rivers End Apartments, Ltd.*** 167 B.R. 470, 484 (Bankr. S.D. Ohio 1994).

The Lenders' argument that the debtor could not obtain a "new loan" in the market place so highly leveraged might be so, but in actuality no new loan is being made here at all. Instead, the court is sanctioning the workout between the debtor and the Lenders. New funds are not being advanced without the consent of the claimants. ***See e.g., In re***

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[31] The debtor actually had a choice of the base lending rate or the Eurodollar rate (LIBOR) plus the 2.75%, plus the excess leverage charge as long as the debtor was not in default under the credit facility. It was Mr. Furlong's uncontradicted testimony that the debtor consistently chose the lower LIBOR rate, and the debtor was not paying the default rate at the time of the petition.

Ridgewood Apartments of DeKalb County, Ltd., 183 B.R. 784, 792 (Bankr. S.D. Ohio 1995) (lender is not actually extending new monies to Debtor; rather it is receiving repayment of a previous loan.); ***In re Overland Merchandise Mart P'ship, L.P.,*** 167 B.R. 647, 659 (Bankr. D. Kan. 1994) ("chapter 11 plan like this one does not involve a new loan being made by a stranger to the case, but an adjustment to the rights of a creditor who is already owed money"). The claimant is entitled to be protected in two dimensions: (1) for the property interest it has because repayment is secured by the debtor's assets, and (2) from dilution of dollar value expected to occur over the proposed repayment term. ***Id.*** Any windfall because of bankruptcy is neither contemplated nor required under the Code. The court's role is not to reward the creditor for the "new loan" to a bankrupt debtor, but instead only to provide the creditor with the present value of its claim.

Furthermore, the court has previously determined that the Second Joint Amended Plan is feasible. This finding of feasibility puts the court's endorsement that, despite the bankruptcy filing, this debtor is credit worthy for reorganization purposes. As noted by the Bankruptcy Court for the Southern District of Ohio in ***In re Ridgewood Apartments of DeKalb County, Ltd.,*** 183 B.R. at 792 "if a plan of reorganization is feasible, qualification of the 'borrower' is established." In other words, "the separate feasibility determination,[] qualif[es] the debtor for a standard, actual market rate." ***In re Overland Merchandise Mart P'ship, L.P.,*** 167 B.R. at 659. The qualification of the debtor as an acceptable risk by virtue of the feasibility determination sets up neatly the Sixth Circuit's mandate that the market rate be used to set the cramdown interest rate to provide the Lenders with the present value of their claims.

The court will therefore determine, based on its assessment of the credibility and reliability of the expert witnesses, what best accomplishes the market rate under the judicial precedent in this Circuit of the coerced loan theory.

(b) The Credibility of the Expert Witnesses

The court finds that Mr. Rosen's testimony was the most comprehensive, understandable, reliable, and credible on the interest rate issue. Although Mr. Benjamin and Mr. Wylly provided credible and interesting testimony about the 12.16% WACC rate, the court finds that under the coerced loan theory, their testimony does nothing to assist the trier of fact. The blended rate testimony gives relevant information to a loan-specific situation, but does not provide helpful testimony as to the broader general market place from which this court must assign an appropriate interest rate.

Mr. Rosen testified that in his professional opinion, and based upon his expertise as an interest rate analyst, under the "coerced loan" theory, the appropriate level of interest to provide the Lenders with the present value of their claim is the six-year Treasury Bill plus 350 basis points. No alternative rate was suggested by the Lenders other than their blended rate. The court finds Mr. Rosen's testimony highly credible on this issue and finds that the rate proposed in the Second Joint Amended Plan does provide the Lenders with the present value of their claim based on Mr. Rosen's capable and thorough analysis.[32]

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[32] Mr. Rosen's testimony about the interest rate is completely consistent with the parties' past dealings. Given that the Lenders were already receiving an "excess leverage charge" of approximately 4.5% under the Fifth Amended and Restated Credit Agreement which resulted in an approximate rate of 6.5%, the

The court, therefore, overrules the Lenders' objection pursuant to 11 U.S.C. § 1129(b)(2) that the plan does not provide the present value of their secured claims.

J. Section 1129(b) - Fair and Equitable with Respect to Unsecured Deficiency Claim (Class 5 Interest Rate)

The holder of an unsecured claim should receive "property of a value, as of the effective date of the plan, equal to the allowed amount of such claim" under the cramdown provisions of 11 U.S.C. §§ 1129(b)(2)(B)(i). The Second Joint Amended Plan proposes to pay the unsecured deficiency claim of the Lenders at an interest rate of 350 basis points above the three-year Treasury Rate, approximately 5.48%.[33] The Lenders protest that not only is this rate too low, but it is ridiculously low given that unsecured debt is even more risky than secured debt which is to be paid at a higher rate. The debtor argues that the interest rate on the unsecured debt should be determined in the same method as

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debtor's plan proposal of approximately 6.8% seems not only reasonable but completely in line with what the "market" would bear. Furthermore, according to the debtor's financial projections the Total Debt to EBITDA ratio will reach 3.68x by 2004, and under the Fifth Amended and Restated Credit Agreement, the Lenders were only entitled to an excess leverage charge of 4.5% when the debt to EBITDA ratio exceeded 4x.

[33] The Plan actually provides that the interest rate shall be 350 basis points over the three-year Treasury Rate or "such other rate as determined by the Bankruptcy Court at the Confirmation Hearing as necessary to provide the holders of Allowed Unsecured Claims with the present value of their Allowed Claim."

the secured debt, and that the proposed rate provides the Lenders with the present value of their unsecured claims.

The debtor relied upon the expert testimony of Mr. David M. Resha.[34] Mr. Resha testified that based upon his past experience as a lender, he attempted to create a methodology to rate the creditworthiness of the debtor, and therefore assign an appropriate interest rate. He concluded that there should be a 75 basis point difference between the secured debt and unsecured debt to provide present value. He used the three-year Treasury Bill since the term of the loan is three years. Mr. Resha's methodology, he admitted, was self-created, but it was based upon his experience and knowledge as an expert in the financing field.

The Lenders relied upon Mr. Benjamin and Mr. Wylly to testify concerning the appropriate interest rate for the Class 5 Claims. Both experts were in agreement that the rate proposed

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[34] Mr. Resha is presently on the Board of Directors for one public and one private company. In the past he has served as the Chief Operating Officer of FINOVA Mezzanine Capital Corporation where he was responsible for mezzanine investment for middle market companies in the United States and Canada. Investments totaled more than $1 billion for more than 300 companies. He has raised over $400 million in public equity and $500 million in institutional debt. Prior to that he served as Senior Vice President at First Union Bank in Nashville. Before that, Mr. Resha was Executive Vice President at Gulf Federal Savings Bank where he managed problem assets and developed a loan syndications subsidiary. He has also worked at New Orleans Federal Savings Bank, and Colonial Bank in New Orleans. He is an American Graduate of International Management, and of Loyola University.

by the debtor was far too low. Mr. Wylly's report best summarizes the findings of both experts:

> It is my opinion that unsecured loans are very difficult to obtain in the current capital market environment, particularly for borrowers with less than $20.0 million in EBITDA. Companies with less than $20.0 million in EBITDA can sometimes obtain unsecured term loans that are capped at 20.0% to 30% of the amount of fully collateralized loan advance. These unsecured term borrowings are typically priced at LIBOR plus 3.00% to 5.00% and must be repaid in equal quarterly installments over three year periods.
>
> For companies with EBITDA in excess of $20.0 million, unsecured loans are available from senior lenders but on fairly restrictive terms. Based on my recent experience and knowledge of the current markets, senior debt is limited to 2.0x to 3.0x EBITDA and total debt is limited to 3.0x to 4.0x EBITDA. In addition, the interest rates charged for these types of loans typically will range from LIBOR plus 2.25% to 5.25% depending upon the credit quality of the borrower. Many transactions of this type are rated by agencies such as Moody's and S&P. Generally, the term of these facilities will range from three to five years.
>
> The market is currently available only to credits rated single B or higher. If the Plan is approved in its current form, the Company's rating would be substantially lower than single B and the company would be unable to access this market.

...

> If the Court determines that the Secured Lenders should receive the Class 5 note in the amount of $11.1 million, the rate of return which would be required in order to provide the holder of the Class 5 note with present value equal to $11.1 million would be 16.8% per annum.

Exhibit 105. Mr. Benjamin agreed that the appropriate rate of return for the Class 5 claims would be 16.8%. In their expert opinions, the risk on an unsecured loan would be such that the higher rate of return would be justified.

While the court found Mr. Resha's testimony helpful, the court cannot find that he was the more reliable witness. Mr. Resha's methodologies were admittedly self-created, untested, and novel. The court recognizes his qualifications as an expert, but it cannot credit his testimony as to what rate of return provides present value on the deferred payments to Class 5.

Although Mr. Wylly and Mr. Benjamin did provide the more credible testimony with respect to their opinion about the appropriate rate of return for the unsecured debt, their testimony that 16.8% is the correct interest rate appears to be overly generous.[35] The 16.8% rate appears to provide the

---

[35] The 16.8% figure comes from the WACC calculations with respect to valuation and interest rate calculations for the Class 2 creditors. The unsecured deficiency claim of the Lenders is approximately $11.1 million, and Mr. Benjamin's WACC calculations assumed a senior debt component of $104,566,000 a mezzanine component of $42,777,000 and an equity component of $102,657,000 for an overall indicated capital structure of $250,000,000. The WACC interest rate was 11.23%. The court does not agree that the Class 5 unsecured debt instrument should be

Lenders with a portion of the blended rate considered in the WACC calculations, but not indicative of the interest rate if this debtor sought the $11.1 million unsecured loan in the market place. A bankruptcy court is not bound to accept the values contained in the parties' appraisals; rather, it may form its own opinion considering the appraisals and expert testimony. ***See e.g., In re Abruzzo,*** 249 B.R. at 86 ("I am left to some extent with the proverbial battle of the appraisers. Finding merit to both their positions, the only conclusion I can reach is to find some value in between."). "The valuation of property is an inexact science and whatever method is used will only be an approximation and variance of opinion by two individuals does not establish a mistake in either." ***Boyle v. Wells (In re Gustav Schaefer Co.),*** 103 F.2d at 242.

The court finds Mr. Wylly's opinion concerning the market for a company with EBITDA in excess of $20.0 million to be the most helpful in determining what would provide Class 5 with the present value of its claim. Mr. Wylly's opinion is predicated upon several factors:

(1) a company with in excess of $ 20.0 million in EBITDA

(2) Loan from a Senior Lender on an Unsecured Basis

(3) Senior Debt Limited to 2.0x to 3.0x EBITDA

(4) Total Debt is 3.0x to 4.0x EBITDA

(5) Credit Rating Single B or Higher

---

treated as an equity risk to determine the interest rate.

Mr. Wylly's report explained that the interest rate typically charged on these three to five year loans is LIBOR plus 2.25% to 5.25%. The debtor only meets criteria (1) and (2). The testimony and documentary evidence clearly establish that the debtor's total debt is closer to 5.5x to EBITDA. The credit rating of this debtor is unknown, but Mr. Wylly's expert opinion is that the debtor's rating would be substantially lower than single B.[36]

This market is technically unavailable to the debtor, but under the coerced loan theory, it is the court's task to consider the market, and then create the loan terms, given the market, that will provide present value to the claimholder. In this case, the court finds that the rate of return which would be required in order to provide the holder of the Class 5 note with present value equal to $11.1 million would be LIBOR plus 7.25%.[37] Even assuming a higher credit rating and less leverage, the debtor would pay LIBOR plus 5.25%. The extra 200 basis points will provide the Lenders with the present value of their approximately $11.1 million claims. The interest rate shall be fixed as of the Effective Date of the plan at LIBOR plus 7.25% for the three year term of the note.

---

[36] Although this court's finding of feasibility endorses the creditworthiness of the debtor to a large extent, the court does not "rate" the debtor. Accordingly, the court will accept Mr. Wylly's opinion that the debtor's credit rating would be lower than single B, but will likewise take into account this court's endorsement of the debtor's plan as feasible.

[37] As of the writing of this decision, the LIBOR was approximately 1.33%. This amounts to approximately 8.58%.

The court finds that the rate selected is consistent with all proof adduced at the confirmation hearing. The debtor proposed to pay 350 basis points over the three-year Treasury Bill, and if the interest rate were attached to the three-year Treasury (approximately 2.0% as of this decision), it is as if the court added on 650 basis points instead of 350 basis points. Since no testimony was offered by the Lenders as to what the interest rate should be if it were to be fixed off of the 3-year Treasury Bill, the court uses the Lender's proof concerning LIBOR rates.

If the court had used the 16.8% suggested by the Lenders, then the $ 11.1 million note would, in essence, be treated as an equity risk rather than a debt instrument. Under the law of this Circuit, the note should be treated as a debt instrument that was obtained in the market place in order to select the rate of return. The rate selected by the court is higher than the return to the secured class to recognize the riskier nature of an unsecured loan, and it is higher than a single B rated company would have to pay to acknowledge that the total debt to EBITDA ratio is greater than in the ordinary market place. However, the rate is not so high as to provide the Lender with a windfall because of the debtor's reorganization efforts. The court finds the selected rate of LIBOR plus 7.25% as of the Effective Date of the Plan to be a fair approximation of what the debtor would have to pay if the loan were obtained in the (non-existent) market for an unsecured loan.

Accordingly, the court overrules the Lender's objection to the extent that the Plan does not provide the Lenders with the present value of their Class 5 Claims. The debtor's plan provided for the court setting an interest rate other than proposed by the plan, and with the new interest rate for Class 5 of LIBOR plus 7.25% fixed as of the Effective Date of the

Plan for the three year term of the note, the court overrules the Lenders' objections to the treatment of Class 5.

K. Section 1129(b)(2) - Fair and Equitable (The Absolute Priority Rule)

The Lenders object that the Second Joint Amended Plan is not fair and equitable because it violates the so-called "absolute priority rule." Whether a plan is fair and equitable is a mixed question of law and fact to be determined on a case-by-case basis. ***In re Creekside Landing, Ltd.,*** 140 B.R. 713 (Bankr. M.D. Tenn. 1992). Section 1129(b)(2)(B) provides as follows:

> (B) With respect to a class of unsecured claims-
>
> > (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
> >
> > (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. § 1129(b)(2)(B)). To be fair and equitable the plan must either provide for payment to that class in the manner specified by § 1129(b)(2)(B)(i), or provide that the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property. ***See*** **11 U.S.C. § 1129(b)(2)(B)(ii).** The latter provision is often referred to as the "absolute priority rule."

The absolute priority rule precludes equity owners from retaining an interest in the reorganized debtor if creditors will not be fully paid. However, under § 1129(b)(2)(B)(i), a plan will be fair and equitable with respect to a dissenting class of unsecured claims if each holder in the class receives property, the present value of which is equal to the amount of the claim. In other words, a cramdown may proceed only if the objecting class of creditors is paid full present value.[38]

The Lenders' objection regarding the absolute priority rule is premised upon the argument that they have not received the present value of their Class 2 and Class 5 claims. Because the court has found that the plan does provide the Lenders with the present value of their claims, the plan is a 100% plan, and equity may retain their ownership without violating the absolute priority rule.

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[38] The court in ***In re Schriock Constr.Inc.,*** 167 B.R. 569 (Bankr. D.N.D. 1994) explained this concept well:

> The strictures of the absolute priority rule thus require the class of *unsecured creditors to be fully satisfied in all of its legal entitlements before any junior* class, such as equity holders. This mandate necessarily requires that unsecured creditors receive either full payment as of the effective date of the plan or the "present value" of their claim through the stream of deferred payments. Simply put, the law in this area is well settled and requires that if the payments to the unsecured creditors are deferred over time, an appropriate discount rate, or rate of interest, must be afforded in order to compensate for the time value of money and pay the claimants the full value of their claims.

167 B.R. at 578 (emphasis in original) (citing numerous other decisions for this same proposition).

The court therefore, overrules the Lenders' objection concerning the absolute priority rule.

IV. Conclusions

The court finds that the Second Joint Amended Plan should be confirmed. The court finds that: (1) the plan complies with all applicable provisions of the Code (1129(a)(1)), and that substantive consolidation of the debtors is appropriate; (2) the plan proponents comply with applicable provisions of the Code (1129(a)(2)); (3) the plan is proposed in good faith (1129(a)(3)); (4) the plan meets the best interest of creditors test (1129(a)(7)); (5) confirmation is not likely to be followed by liquidation, i.e. the plan is feasible (1129(a)(11)); (6) the plan does not improperly classify certain classes of claims (1122); (7) the plan does not unfairly discriminate as to Class 5 (1129(b)(1)); (8) the plan is fair and equitable because it does not violate the absolute priority rule (1129(b)(2)); (9) the plan is fair and equitable because it provides the Lenders with the present value of their secured claim (1129(b)(2)); (10) the plan is fair and equitable because it provides an appropriate rate of interest, as amended by the court, on their unsecured deficiency claim (1129(b)(2)); and (11) the plan is fair and equitable in that it properly values the Lenders' allowed secured claim (1129(b)(2)). As to all other confirmation provisions pursuant to 1129 and title 11, the court finds that through the uncontested testimony of Mr. Joseph Furlong, American HomePatient CEO, and Thomas Mills, COO, the debtor has met its burden of proof to establish that the Joint Second Amended Plan is confirmable.

The court instructs counsel for the debtor to prepare an order, not inconsistent with this decision, within ten (10) days of entry of this decision.

It is therefore so ORDERED.

This 15th day of May, 2003.

/s/_____
George C. Paine, II
Judge, United States Bankruptcy Court

APPENDIX E

SIXTH CIRCUIT COURT OF APPEALS JOINT APPENDIX EXCERPTS

[J.A. 1056-58]

HOULIHAN LOKEY HOWARD & ZUKIN
Investment Banking Services

MEMO

To: Frank Wright
From: Patrick Hurst, David Rosen, Greg Miller
Date: April 8, 2003
RE: American Home Patient Interest Rate Calculation

Summary

The purpose of this memo is to present our findings and our methodology for determining the appropriate interest rate for American Home Patient's ("AHOM" or the "Company") senior debt under the coerced loan approach. We estimated that 350 basis points ("bps") is the appropriate spread above both LIBOR and the 6-Year Treasury yield for floating and fixed-rate debt, respectively. This determination was based on analysis of (1) newly issued non-investment grade healthcare company bank debt (issued between January 1, 2002 and March 1, 2003), (2) the interest rates on the senior debt of healthcare companies with $200 million to $1 billion in revenue and at least $50 million in debt as indicated in the companies' most recent 10-K's, (3) the differential in spreads

over risk-free rates on BBB-rated amortizing bank debt versus BBB non-amortizing bonds, and (4) consultation with Houlihan's private debt placement personnel. Parameters considered in undertaking this debt analysis included the industry in which AHOM operates, the term, the amortization period and the loan size. As instructed, under the coerced loan approach, we did not consider loan to value or the amount of leverage in arriving at the appropriate interest rate.

Based on the analysis of (1) and (2), we estimated that the appropriate spread for amortizing debt over LIBOR/Treasuries would be 300 basis points. Based on (3) and (4), we estimated that an additional 50 basis points should be added to account for the lack of amortization of the debt for a total of 350 basis points over LIBOR/Treasuries.

Background

You have requested that we derive the interest rate utilizing the coerced loan approach. Furthermore, you have instructed us that we are to give no consideration to loan to value or the amount of leverage in arriving at this rate. As a result, parameters included in undertaking this debt analysis were the industry in which AHOM operates, the term, the amortization period and the loan size. We used 6-month LIBOR as the risk-free rate for floating-rate debt and 6-year Treasuries as the risk-free rate for fixed-rate debt. The spread determined in this analysis is the same whether applied to fixed or floating-rate debt.

Calculation of Interest Rate

In order to determine the appropriate interest rate for amortizing debt, we analyzed the following: (1) interest rates on new issuances of non-investment grade healthcare bank

debt (issued between January 1, 2002 and March 1, 2003), and (2) the interest rates on the senior debt of similar non-distressed healthcare companies as provided in the companies' most recent 10-K's. Based upon these analyses, we estimated that LIBOR + 300bps is the appropriate rate of interest for AHOM's debt were it amortizing.

- *Analysis of Newly-Issued Non-investment Grade Healthcare Bank Debt*. Our sample included 44 new issuances of bank debt ranging in size from $8.4 million to $1.25 billion, with an average facility size of $206.9 million. Maturities ranged from 24 to 96 months, with an average of 61 months (5.1 years). The interest rates ranged from LIBOR + 125bps to LIBOR + 425bps, with the average of LIBOR + 287bps and a median of LIBOR + 275bps. (See Exhibit A for detail.) Of the 44 issuances, 25 were below LIBOR + 300bps, 5 were at LIBOR + 300bps and 14 were above LIBOR + 300bps. Of the tranches above LIBOR + 300 bps, 9 were between LIBOR + 325bps and LIBOR + 350 bps, and only 5 were above LIBOR + 350.

- *Analysis of the Interest Rates on the Senior Debt of Similar Healthcare Companies*. We examined the senior debt structure of 14 non-distressed healthcare services companies of comparable size (revenues from $200 million to approximately $1 billion and at least $50 million in debt) to AHOM (See Exhibit B). The range of interest rates on the floating rate debt was 2.43% to 4.48% with average and median interest rates of 3.23% and 3.11% (LIBOR + 200bps and LIBOR + 188bps, respectively). The average and median spread to Treasuries on the fixed rate debt was

299bps and 301bps, respectively. There was only one company with fixed-rate debt.

Based upon AHOM's proposed capital structure, the bank debt does not fully amortize over the 6-year term; 79.6 million amortizes under a fixed-rate scenario (31.8% of post-restructuring principal). Consequently, we determined that an increase in interest rate was appropriate given the specific amortization of AHOM's debt. In making this determination, we analyzed interest rates on BBB bank and BBB bond debt, and had discussions with Houlihan's private placement personnel. Based upon this analysis, we determined that an additional 50 basis points should be added to the spread estimated for amortizing debt (300 bps) given AHOM's specific amortization over its term.

- *Analysis of Differential between BBB Bank and BBB Bond Debt*. We compared amortizing bank debt and non-amortizing bond debt given that bank debt typically amortizes during the life of the loan while bond debt typically does not. We examined investment grade (BBB) debt so as to neutralize company-specific risk factors. Our sample of bank debt consisted of 623 debt issuances made over the past sixteen months. The average interest rate for the sample was LIBOR + 91bps. This compared to an average 5-year BBB bond rate of 5-year Treasuries + 160bps. Accordingly, the resulting spread between the bank and bond rates was 69 basis points.

Debt Type	Rating	Base	Spread
Bank[1]	BBB	LIBOR (6-month)	91
Bond[2]	BBB	Treasury (5-year)	160
		Difference	69

(1) Source: Loan Pricing Corp. LIBOR at 1.23% as of 3/31/03.

(2) Source: Bloomberg Rates for yield on 5-yr BBB industrial bond index (4.31%) and 5-year Treasury (2.71%) at 3/31/03.

- *Discussion with Houlihan's Private Placement Personnel.* Houlihan's private placement personnel indicated that the appropriate spread between amortizing and non-amortizing tranches of debt, maturity horizon and credit risk held constant, is 50-75 basis points.

Accordingly, we determined that the amortization adjustment for AHOM's debt is 50 basis points, given that some of the debt amortizes. This leads us to the conclusion that the appropriate interest rate on AHOM's bank debt is LIBOR/Treasuries + 350 basis points.

TRANSCRIPT EXCERPTS

* * * * *

[J.A. 1213]

Q. What is the approximate level of leverage that this Debtor contemplates emerging from bankruptcy with?

A. Upon emergence it's about 6 to1.

Q. Have you ever seen a senior health care services loan that contemplated leverage in excess of 6 to 1 that you've been involved with?

A. Are you asking a health care company with a senior debt component?

Q. Right. Is there a senior debt -- is there a senior debt loan out there that contemplates going in a leverage in excess of 6 to 1?

A. Not for raising new money, no.

Q. Why not?

A. On a 6 to 1, on that leverage characteristic you can't get new financing.

Q. Why not?

A. The leverage ratio, it would be considered too high for new financing.

* * * * *

[J.A. 1230]

Q. Going back to page one of your report, bottom paragraph, you state that you gave no consideration to loan to value or the amount of leverage in arriving at the rate; is that correct?

A. That's correct, I mean, we did for the -- only to the extent that we were looking for a normalized capital structure, we did not -- so obviously there's going to be some leverage because you're borrowing under these scenarios, but we tried to take what in normal market terms would be what the rates would be -- what the appropriate rates would be.

Q. Did -- did you calculate the rate based on a six-to-one leverage?

A. No, we did not.

Q. And if American Home Patient, for example, went out in the marketplace right now to borrow $250-million with a six-to-one leverage, do you think it could?

A. No, I don't believe it could.

Q. Certainly not as a senior debt facility; is that correct?

A. Correct. The assumption inherent in our analysis is that you could borrow two-and-a-half to three times senior debt, and that's what these rates are driven off of.

* * * * *

[J.A. 1232]

Q. Are you in any way telling this Court that if a note of $250-million with a six-point-eight percent interest rate as structured in the plan could be sold for $250-million?

A. No, I'm not.

Q. That was not part of what you were asked to do; is that correct?

A. That's correct.

* * * * *

[J.A. 1240]

Q. Now, in response to one of my questions in the deposition, you said that you wanted to make sure it was clear that we, which I believe is Hoolihan, didn't believe that this was something we could say was worth the face amount? Do you remember that testimony?

A. Yeah, in response to your question, yes, I did.

Q. And that relates to the note, the $250-million note that was given to the Lenders?

A. That's correct.

Q. And Hoolihan couldn't testify that that was going to be worth $250-million?

A. That's correct. We don't believe there's a market for that note.

* * * * *

[J.A. 1241]

Q. And when I asked you what the average rate for the traditional capital structure we've been discussing would be you answered that it would be approximately twelve-and-a-half percent; do you remember that?

A. In response to the blended rate --

Q. Yes.

A. -- between the debt and the equity, that's correct.

Q. Yes. if you went through and arithmetically blended the rates on the targeted capital structure, you'd get about twelve-and-a-half percent?

A. Correct.

Q. And that's coincidentally about what Mr. Hurst used as the weighted average cost of capital in his valuation analysis, isn't it?

A. Correct.

* * * * *

[J.A. 1246]

Q. Yes. And, in fact, in the marketplace today there is no option available to obtain 250-million of senior debt financing the way the company has set forth.

A. Correct.

* * * * *

[J.A. 1261-62]

With respect to Exhibit F-1, we took the 250-million senior secured claim proposed to be reinstated, we discounted this by the weighted average cost of capital, the twelve-point-one-six percent that's outlined in Exhibit E-1, and we computed that the value of that future stream of payments, that $250-million note proposed to be delivered to the senior secured lenders, is not $250-million but in fact $194-million. And the implication of these findings is significant in that we spent a lot of time trying to find out where are the pieces of the capital structure. On Exhibit F-2

Q. (By Mr. Phelan) Let me make sure I understand what F-1 is. F-1 you're telling me that the -- the present value of the stream of payments represented by that $250-million note, at the interest or rate of return that was provided for in the plan of six-point-eight percent, doesn't give me a present value of $250-million?

A. That's correct. As indicated, it's a present value of $194-million.

* * * * *

Supreme Court, U.S.
FILED
JUN 5 - 2006
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No. 05-1398

In the Supreme Court of the United States

NEXBANK SSB, ET AL.,
Petitioners,

v.

AMERICAN HOMEPATIENT, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented is whether the Court of Appeals' affirmance of the Bankruptcy Court's calculation of a cramdown interest rate expressed as the 6 year treasury bill rate + 350 basis points for risk, or 6.785%, conflicts with *Till*'s instruction to determine the interest rate in a Chapter 11 cramdown pursuant to either the formula approach or an efficient market analysis.

RULE 29.6 STATEMENT

American HomePatient, Inc. (a Delaware corporation) as substantively consolidated with 24 of its subsidiaries under its confirmed Chapter 11 Plan ("AHP," or the "Debtors") is a publicly-held company, but is neither a subsidiary nor an affiliate of a publicly owned corporation, nor is there any publicly held company that owns 10% or more of the stock of AHP.

The Unsecured Creditors Committee is not a publicly owned corporation, however certain of its members are. The members of the Unsecured Creditors Committee appointed by the United States Trustee on August 6, 2002 (Joint Respondent with the Debtor, American HomePatient, Inc.) are Invacare Corporation, Mallinckrodt, Inc., a Delaware Corporation, ResMed Corp., Respironics, Inc., and Ross Products, a division of Abbott Laboratories. Publicly-owned subsidiaries or affiliates of corporations on the Unsecured Creditors Committee are as follows: (1) Mallinckrodt, Inc., a Delaware corporation, is a third-tier subsidiary of Tyco International, a Bermuda corporation and Tyco International is a public company traded on the New York Stock Exchange; (2) ResMed Corp. is a direct subsidiary of ResMed, Inc., which is a public company traded on the New York Stock Exchange; and (3) Abbott Laboratories is a public company traded on the New York Stock Exchange.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

REASONS THE WRIT SHOULD BE DENIED 5

I. REVIEW BY THIS COURT IS UNNECESSARY BECAUSE THE INTEREST RATE AFFIRMED BY THE COURT OF APPEALS' DECISION IS SOUND UNDER BOTH THE FORMULA APPROACH AND THE EFFICIENT MARKET APPROACH AND THUS PRESENTS NO CONFLICT WITH *TILL*. 5

A. *The Interest Rate Affirmed by the Court of Appeals Decision is Sound Under the Formula Approach and Presents No Conflict with* Till. 5

B. *The Interest Rate Affirmed by the Court of Appeals' Decision is Sound Under an Efficient Market Analysis and Presents No Conflict with* Till. 7

C. *The Petitioners are Seeking a Windfall, Not Present Value and This is Not What Till Requires* 8

D. *Conclusion: The Court of Appeals Decision Upholds an Interest Rate Calculated Consistent with the Formula Approach, Mindful of Characteristics Specific to the Actual Loan to the Actual Debtors Under an "Efficient Market" Analysis, and that Does Not Conflict With* Till 10

II. IT IS PREMATURE SPECULATION TO SUGGEST THAT LOWER COURTS ARE UNCERTAIN AS TO WHETHER AND HOW *TILL* APPLIES TO CHAPTER 11 REORGANIZATIONS. 12

III. NO SPLIT EXISTS AMONG THE COURTS OF APPEAL IN POST-*TILL* JURISPRUDENCE ON CRAMDOWN INTEREST RATES IN CHAPTER 11 CASES 13

CONLCUSION 16

APPENDIX 1, Transcript Excerpt 1b

APPENDIX 2, Treasury Current Value of Funds Rate . 2b

TABLE OF AUTHORITIES

CASES

GMAC v. Jones,
999 F.2d 63 (3rd Cir. 1993) 14

In re Hardzog,
901 F.2d 858 (10th Cir. 1990) 14

In re Smithwick,
121 F.3d 211 (5th Cir. 1997) 14

Till v. SCS Credit Corp.,
541 U.S. 465 . . . . . passim

STATEMENT OF THE CASE

Petitioners make several statements in their "Statement of the Case" that mischaracterize the record and must be corrected. Petitioners inaccurately state that the Debtors presented no evidence at trial that the present value of the Class 2 note was $250 million and that the "Debtors' experts Mr. Hurst and Mr. Rosen specifically declined to opine that the Class 2 note had a present value of $250 million, or, for that matter any other value." To the contrary, the Debtors' expert, Mr. Hurst, clearly and specifically testified that "the present value of the loan amount is 250-million." Resp. App. 1 at 1b. Further, Petitioners inaccurately state that the expert witnesses for the Debtors and the Petitioners "agreed" that the market would "require" a rate of return of over 12% for these Debtors. Instead, what the Debtors' experts actually testified was that *strictly arithmetically*, if the rates on the tranches of a more "traditional capital structure" such as that suggested by Petitioners' counsel were averaged or arithmetically blended, the resulting interest rate is 12.5%. Pet. App. 140a. The Debtors' experts agreed that the Petitioners' counsel's math was correct, nothing more.

SUMMARY OF ARGUMENT

The Court of Appeals decision affirming the cramdown interest rate imposed on Petitioners presents no conflict with *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). Under any reading of *Till*, there are only two available methods for calculating a cramdown rate of interest under any Chapter of the Bankruptcy Code. Under either the formula approach or an efficient market analysis, the Court of Appeals' decision presents no conflict with *Till*, no basis for certiorari exists, and the Writ should be denied.

Till holds that in a Chapter 13 case a cramdown interest rate must be calculated using a formula of the prime rate plus a risk adjustment generally in the range of 1-3% based on "the circumstances of the estate, nature of the security, [and] duration and feasibility of the plan."[1] Prior to the ruling in *Till*, albeit under the verbiage of the coerced loan theory, the Bankruptcy Court calculated the cramdown interest rate by starting with a risk-free base rate (6-year Treasury bill) and adjusting upward from that base rate (350 basis points) to account for risk attendant to the Plan and AHP's financial circumstances.[2] The Bankruptcy Court's methodology is thus faithful to the formula approach endorsed by *Till*.

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[1] *Till*, 541 U.S. at 479.

[2] The Debtors' expert opined that the appropriate interest rate for the senior debt instrument under the Plan was 350 basis points over LIBOR for a floating rate and over 6-year Treasury for a fixed rate. Pet. App. 132a. He applied a spread of 350 basis points based on an analysis of "the industry in which [AHP] operates, the term, the amortization period and the loan size." Pet. App. 133a.

The Petitioners appear largely to ignore *Till*'s adoption of the formula approach by refusing to acknowledge the formula itself which is prime + a general range of 1-3% adjustment for risk. Petitioners omit any substantive discussion of beginning with the prime rate, refuse to acknowledge this Court's reference to a 1-3% risk adjustment range, and instead interpret the risk adjustment as compelling consideration of "debtor-specific characteristics" in a manner wholly inconsistent with *Till* and §1129(b). To get away from the formula approach which they know will produce a rate they do not like, Petitioners cull through *Till* and cherry-pick to craft an argument to elevate the interest rate from providing present value to producing a windfall. Petitioners' suggestion that the rates on all financing possibilities in the global marketplace must be blended together to create a cramdown interest rate would redefine the "present value" standard of § 1129(b)(2) to ensure that no Chapter 11 debtor would ever be able to reorganize.

The rate imposed on Petitioners is 6 year Treasury bill + 350 basis points for risk. If straight application of the formula approach is all that *Till* requires in Chapter 11, the methodology employed by the Bankruptcy Court in calculating the cramdown interest rate remains sound and presents no conflict with *Till*. No basis exists for granting the Writ.

In the Chapter 11 context, however, the plurality in *Till* also penned footnote 14 which suggests that "when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce."[3] If imposition of the cramdown interest rate an "efficient market

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[3] *Till*, 541 U.S. at 476, n. 14

would produce" is what is required under *Till* in Chapter 11, the Court of Appeals still correctly held that the Bankruptcy Court's ruling was sound and does not conflict with *Till*. The interest rate determined by the Bankruptcy Court was calculated based on an analysis of the actual market consistent with the *Till* footnote. No basis exists for granting the Writ.

The Petition does not speak in the language of *Till*. While *Till* speaks in terms of a simple formula or a market analysis approach to setting an interest rate, Petitioners argue for an interest rate driven solely by a risk assessment based on "debtor-specific characteristics." It is therefore nearly impossible to glean from the Petition which one of the approaches, either formula or "efficient market," the Petitioners believe should govern the computation of a cramdown interest rate in Chapter 11. The reason for this is simple. Petitioners want a windfall. Petitioners want to receive an interest rate of 12.16%. This interest rate is unsupportable under both the formula approach and the "efficient market" approach, or any other reasonable interpretation of *Till*. The rate of 6.785% upheld by the Court of Appeals is, however, sound under both approaches and, not coincidentally, is nearly identical to the contractual rate of interest the Petitioners had agreed to before the bankruptcy filing.[4]

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[4] Not to default to the prepetition contract rate, a proposition the *Till* plurality rejects, but simply to put the interest rate issue into perspective, the Court should be aware that the pre-petition interest rate payable to Petitioners was 6-month LIBOR plus 350 basis points, plus an excess leverage charge that roughly equated to another 100 basis points, or 6.5%. Pet. App. 60a. When the Bankruptcy Court rejected blending other rates of return on other types of financing or equity investments into the calculation, not surprisingly, the Court ended up at a rate not only consistent with

Finally, *Till* was decided less than two years ago. The only Court of Appeals to address the issue of setting a cramdown interest rate post-*Till* under any Chapter of the Bankruptcy Code is the Sixth Circuit in this case. Petitioners' suggestion that a split persists among the Courts of Appeal as to how to set a cramdown interest rate post-*Till* is premature speculation. No basis for certiorari exists and the Writ should be denied.

REASONS THE WRIT SHOULD BE DENIED

I. REVIEW BY THIS COURT IS UNNECESSARY BECAUSE THE INTEREST RATE AFFIRMED BY THE COURT OF APPEALS' DECISION IS SOUND UNDER BOTH THE FORMULA APPROACH AND THE EFFICIENT MARKET APPROACH AND THUS PRESENTS NO CONFLICT WITH *TILL*.

A. *The Interest Rate Affirmed by the Court of Appeals Decision is Sound Under the Formula Approach and Presents No Conflict with Till.*

The Petition alleges that certiorari must be granted because the Sixth Circuit decision conflicts with *Till* in that it upheld a bankruptcy court opinion that did not consider characteristics specific to the debtor and to the "loan" to be made under the Plan. Petitioners thus focus unrelentingly on *Till*'s discussion of risk adjustment factors and opine at length as to which debtor-specific, loan-specific or market-based considerations ought to be included in that risk adjustment. This focus is, however, misguided.

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the efficient market, but also not markedly different than that negotiated between the parties pre-petition.

The risk adjustment factors are only part of the formula. In an effort to craft an argument for a grossly inflated interest rate based on their assessment of the Debtors' (allegedly unacceptably high) "debtor-specific" risk of nonpayment, Petitioners have lost sight of the fact that the risk adjustment factors are but one component of the formula approach. The Petition conveniently glosses over the fact that risk adjustment factors are only used to adjust off of a base rate, generally in the range of a 1-3% adjustment. The risk adjustment factors, be they debtor-specific, market-based or otherwise, do not set the interest rate in and of themselves. Computing an interest rate under the formula approach actually begins with the prime rate (or perhaps some other common base rate such as Treasury bill or LIBOR) which is then slightly adjusted upward for risk. Notwithstanding the Petitioners' apparent position that the risk adjustment factors are "controlling,"[5] and that an assessment of risk alone dictates what the interest rate should be, *Till* states that the adjustment off the base rate for risk of nonpayment is generally in the range of 1-3%, hardly the controlling piece of the formula puzzle.

This is the case regardless of which debtor-specific, loan-specific or market-based characteristics the Lenders think ought to be considered as "risk adjustment factors," and this is the case regardless of whether the property to be distributed under a plan is a note. An assessment of risk cannot function to double or triple the base rate under the formula approach. If the risk adjustment factors were the ultimate trump card, as

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[5] The Petition asserts that "[r]eversal is required because the court of appeals' decision fails to follow the rationale adopted by all nine justices in *Till* that consideration of the individual debtor's risk of nonpayment is *controlling* where the property to be distributed in the debtor's plan of reorganization is a note."

it were, the formula approach would be meaningless; the approach would cease to be a straightforward formula easily and predictably applied, all concept of uniformity would be lost, and courts would be left with a case of the proverbial tail wagging the dog.

Under the facts of this case, it is no surprise that the entire first piece of the formula which requires beginning with a base rate is largely ignored by Petitioners. If the Petitioners were to argue that *Till* mandates use of the formula approach in Chapter 11, they would find themselves arguing for a formula of prime + 7.75%, an eye-popping proposition indeed.[6]

The argument that debtor-specific or loan-specific characteristics "control" to set the cramdown interest rate is inconsistent with *Till*'s adoption of the formula approach and provides no basis on which to grant the Writ.

B. *The Interest Rate Affirmed by the Court of Appeals' Decision is Sound Under an Efficient Market Analysis and Presents No Conflict with* Till.

Petitioners cannot get to the interest rate they want under *Till*'s formula approach. Given that *Till* requires application of either the formula approach or, as the Sixth Circuit held, an "efficient market" analysis in Chapter 11, it would seem logical, then, that Petitioners would instead argue that the Writ must be granted on the basis that the Court of Appeals'

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[6] The Prime Rate was 4.25% at confirmation. (Resp. App. 2) Under the formula approach, the Petitioners would have to argue for a formula of prime + 7.75% to get to the 12.16% interest rate they request.

decision conflicts with *Till* because the courts failed to engage in an analysis of what rate an "efficient market" would produce. However, again, this is not what the Petition argues and, again, there is an obvious reason why not. If the Petitioners argue that an "efficient market" analysis controls to set the interest rate in Chapter 11 per *Till*'s footnote 14, then they are stymied. Any argument that the courts below failed to engage in a market-based analysis is foreclosed; the Court of Appeals specifically held that a market analysis was appropriate in Chapter 11 and specifically recognized that the Bankruptcy Court did engage in a market-based analysis to determine the cramdown rate. Pet. App. 18a-20a.

As noted by the Court of Appeals, the Bankruptcy Court "in fact sought to determine what an efficient market would have produced for the loan that the lenders provided" and reached its conclusion on the appropriate rate "only after carefully evaluating the testimony of various expert witnesses." Pet. App. 18a, 20a. "Although the lenders argue that the rate chosen by the bankruptcy court was not the rate produced by an efficient market, this is a question that was fully considered by that court." Pet. App. 19a. Any argument that the Writ should be granted because the courts below failed to consider debtor-specific or loan-specific characteristics is factually inaccurate: the Court of Appeals correctly held that the Bankruptcy Court actually engaged in an "efficient market" analysis to set the interest rate.

C. *The Petitioners are Seeking a Windfall, Not Present Value and This is Not What Till Requires*

Petitioners' insistence that "debtor-specific" and "loan-specific rates" must be considered under *Till* is rather beside the point. As either the "risk adjustment factor" component of the formula approach, or as a part of an analysis of the

"efficient market," those factors are and should be one component courts consider to set the interest rate. These loan and debtor specific risk factors indisputably were considered and caused the Bankruptcy Court to add 350 basis points when it set the interest rate. Pet. App. 108a.

However, Petitioners do not really want consideration of the actual "loan and debtor specific" factors relating to the Plan's actual "loan" to these actual Debtors. What the Petitioners really want considered under the guise of the labels "loan specific" or "debtor specific" factors are the rates on mezzanine financing and equity investments which have nothing whatsoever to do with the actual loan they are being forced to make to these actual Debtors under the Plan.

In an effort to compensate themselves as venture capitalists and elevate their rate of return beyond that of a provider of senior secured debt, Petitioners insist that the Bankruptcy Court erred by not applying a blended interest rate in excess of 12% to the Petitioners' secured claim. In making this argument, Petitioners ignore the goals of the Bankruptcy Code and drastically either misconstrue or misstate the holding of *Till*. Petitioners improperly insist that, in order to calculate the interest rate on the *debt* they are owed, they should be awarded a blended rate that includes the cost of *equity*, a result unsupported by either of the plurality, concurrence or dissenting opinions in *Till* or the policies implicit in the Bankruptcy Code.

The characteristics of each piece of a hypothetical mixed bag of financing theoretically available in the marketplace have no bearing on the characteristics of the real loan under the Plan. The suggestion of an "efficient market" analysis is not a mandate by this Court to focus on all conceivable financing possibilities which, under Petitioners' analysis,

include senior secured debt, equity investments and everything in between. The byzantine argument to average in all aspects of the global marketplace advanced by Petitioners in no way resembles any reasoned interpretation of *Till*.

Not all aspects of the global marketplace are relevant to this type of company borrowing this type of debt. As noted by the Court of Appeals, "the only type of debt contemplated by [AHP]'s reorganization plan was senior secured debt. The inclusion of other types of financing - mezzanine debt and equity - is a pure hypothetical suggested by the lenders." Pet. App. 18a. The actual result of that hypothetical would be an interest rate nearly eight percentage points higher than the 4.25% prime rate in effect on the date the Plan was confirmed which rate "appears to fall under the 'eye-popping' category described unfavorably by *Till*." Pet. App. 19a. At the 12% blended rate their "investment band" produces, Petitioners would receive a rate nearly double their prepetition contract rate and a windfall because of the bankruptcy filing. Pet. App. 117a.

D. *Conclusion: The Court of Appeals Decision Upholds an Interest Rate Calculated Consistent with the Formula Approach, Mindful of Characteristics Specific to the Actual Loan to the Actual Debtors Under an "Efficient Market" Analysis, and that Does Not Conflict With Till*

The tenor of the Petition could lead one to the conclusion that either the Court of Appeals decision was rendered before *Till* or that the Sixth Circuit simply followed their own "coerced loan" precedents and ignored *Till* completely. Neither is the case. In finding that the Bankruptcy Court indeed engaged in an "efficient market" analysis and the

interest rate that analysis yielded passed muster under *Till*, the Court of Appeals implemented *Till* in the Chapter 11 context.

The Court of Appeals (1) did not allow its consideration of the Bankruptcy Court's analysis to be constrained to a mere surface examination of the label "coerced loan theory" and (2) did not allow the "blended rate" hypothetical proposed by the Petitioners to cloud its consideration of the appropriate interest rate on the loan actually contemplated in the Plan. Casting labels aside, the Sixth Circuit specifically examined the Bankruptcy Court's underlying methodology and found that despite the Bankruptcy Court's use of "the rubric of the coerced loan theory," that methodology was sound under *Till*'s "efficient market" analysis. The Sixth Circuit further saw through Petitioners' attempts to be compensated as venture capitalists and to elevate their rate of return beyond that of a provider of senior secured debt. That is not present value, that is a windfall. The Sixth Circuit's affirmance of the Bankruptcy Court's ruling per the *Till* Chapter 11 "efficient market" footnote thus presents no conflict with *Till* and provides no basis for granting the Writ.

Finally, had the Sixth Circuit held that *Till* mandated use of the formula approach in Chapter 11 as well as Chapter 13, the decision below and the interest rate remain sound under *Till*. The Bankruptcy Court actually expressed the cramdown interest rate as a formulaic calculation akin to the methodology required by the *Till* plurality: the Bankruptcy Court took a risk-free rate (6-year Treasury) and adjusted upward for risk (adding 350 basis points), based on the Debtors' expert testimony regarding "the industry in which [AHP] operates, the term, the amortization period and the loan size," all of which are wholly consistent with *Till*'s directive to adjust based on the circumstances of the estate, the nature of the security, and the duration and feasibility of

the plan. Pet. App. 133a. Therefore, under either a formula approach or "efficient market" analysis, the Court of Appeals' decision presents no conflict with *Till* and the Writ should be denied.

II. It is Premature Speculation to Suggest that Lower Courts are Uncertain as to Whether and how *Till* Applies to Chapter 11 Reorganizations.

The gist of the argument at part II of the Petition is that the *Till* opinion (a) is so unclear regarding how this Court intended for cramdown interest rates to be calculated in Chapter 11 that it is useless and/or (b) as a plurality opinion, lacks precedential value such that this Court should grant the Writ in this case to issue a majority opinion and clarify what it intended for *Till* to say. These arguments provide no basis on which the Writ should be granted.

First, to suggest that *Till* is so unclear as to be incapable of application is disingenuous. The Sixth Circuit, the only Court of Appeals to apply *Till* to date, had no trouble issuing a ruling in a Chapter 11 case consistent with *Till*'s instruction. The Sixth Circuit found that, in the Chapter 11 context, courts should first ascertain if an "efficient market" exists. If so, courts should analyze that market and adopt the interest rate that analysis produces. If no efficient market exists, courts should apply the formula approach. Pet. App. 16a. The Sixth Circuit's decision thus does not conflict with *Till*'s instruction, it implements the *Till* Chapter 11 footnote. While Petitioners may not like the rate produced by an efficient market analysis in this case, they nonetheless cannot dispute that courts are capable of following *Till*. *Till* clearly suggests an "efficient market" analysis in Chapter 11 and same was in fact employed below. Pet. App. 18a.

Secondly, while commentators and perhaps a handful of lower courts may be as of yet unsure about *Till*'s precedential value, lack thereof, or applicability to Chapter 11 reorganizations, the state of the law as it exists today does not rise to a level of uncertainty sufficient to declare a conflict among the Courts of Appeal worthy of intervention by this Court. Unless and until the various Courts of Appeal have an opportunity to address cramdown interest rates in Chapter 11 cases post-*Till*, whether a further ruling from this Court in the Chapter 11 context will be necessary remains to be seen.

On this point, it should be noted that the leading Circuit Court level decisions on cramdown interest rates pre-*Till* were Chapter 13 cases all of which were specifically addressed by *Till*. In fact, AHP would suggest that the issue of setting a cramdown rate is litigated most often in the Chapter 13, not Chapter 11, context. Thus, it is likely that this Court, in clearly adopting the formula approach for Chapter 13 cases, has already addressed the issue in the vast majority of cases in which the question presents itself. While the commentators and authors cited in the Petition may enjoy the mental exercise of speculating on the future of *Till*'s application in Chapter 11, until that speculation in law journals becomes a reality in the courtroom, the issue is unripe for further consideration by the Court.

III. NO SPLIT EXISTS AMONG THE COURTS OF APPEAL IN POST-*TILL* JURISPRUDENCE ON CRAMDOWN INTEREST RATES IN CHAPTER 11 CASES

Arguments III. and IV. in the Petition may be addressed together as they are variations on a common theme: that a split exists among the Courts of Appeal on whether to consider "debtor-specific" criteria in setting a cramdown interest rate. This argument may be summarily disposed of

because no current split among the Courts of Appeal exists. Additionally, it should be noted that this argument is a red herring in this specific case because no amount of insistence on consideration of "debtor-specific traits" will justify inflation of the interest rate as Petitioners seek, and debtor-specific traits were in fact considered to set the interest rate in this case.

As to the argument that a split in the Circuits on methodology for setting cramdown interest rates continues to exist post-*Till*, it is indisputable that *Till* overruled many existing decisions by the Courts of Appeal and overhauled the law. Any suggestion, then, that pre-*Till* holdings by Courts of Appeal rejecting the formula approach and endorsing the presumptive contract rate, cost of funds, coerced loan and risk free approaches to setting an interest rate remain good law and create a continuing conflict among the Circuits is inaccurate.[7]

The split among the Circuits as it existed pre-*Till*, with the Courts of Appeal endorsing a myriad of approaches to setting a cramdown interest rate, exists no longer. Many of those decisions by the Courts of Appeal can no longer stand as written. For example, notwithstanding the pre-*Till* case of *GMAC v. Jones*, 999 F.2d 63 (3rd Cir. 1993) in the Third Circuit adopting the presumptive contract approach, a bankruptcy or district court in the Third Circuit today could

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[7] For example, the following cases which expressly rejected the formula approach have been overruled by *Till*: *In re Smithwick*, 121 F.3d 211 (5th Cir. 1997) (rejecting formula approach as codified in local rule); *General Motors Acceptance Corp. v. Jones*, 999 F.2d 63 (3rd Cir. 1993) (express rejection of formula approach); *In re Hardzog*, 901 F.2d 858 (10th Cir. 1990) (express rejection of formula approach).

not simply apply the presumptive contract rate approach, cite to *Jones* and be done. That would be untenable after *Till* because *Till* changed the law. Unless and until the Courts of Appeal address the issue post-*Till*, any suggestion of a continuing conflict is pure speculation.[8]

Secondly, attempts to reframe the issue presented in order to create the appearance of a conflict among the Circuits are futile under the facts of this case. No amount of reframing the issue at bar into the propriety of "consideration of characteristics specific to the debtor" will justify inflation of the interest rate to the heights Petitioners seek. The Petitioners vehemently resist discussing *Till*'s adoption of the formula approach or the "efficient market" approach to setting the cramdown interest rate because, as to the former, Petitioners cannot reasonably argue for prime + 7.75% in light of *Till*'s suggestion of a 1-3% adjustment range and, as to the latter, every court below found that the rate Petitioners are receiving is the market rate for senior secured debt in the home healthcare industry. In short, neither approach endorsed by this Court in *Till* can possibly provide the rate of return the Petitioners seek. Use of the term "rate of return" here is not accidental; as discussed above, what Petitioners seek is a windfall, not present value.

Finally, incessant insistence on an alleged disagreement among the Circuits as to the propriety of considering"debtor-

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[8] Likewise, whether a split exists among the Courts of Appeal regarding consideration of debtor-specific traits in setting the interest rate on a tax claim paid under §1129(a)(9)(C) has little bearing on the issues presented in the case at bar. There is no current split among the Circuits on the issue presented - the methodology to set a cramdown interest rate - as no Court of Appeals other than the Sixth Circuit has ruled post-*Till*.

specific traits" is, respectfully, pointless. Whether or not such disagreement existed pre-*Till* or exists now, this argument provides no basis for granting the Writ in this case. The actual home healthcare market and the interest rate for senior secured debt therein were analyzed, the specific characteristics of these Debtors were actually considered, and the interest rate was upwardly adjusted 350 basis points as a result. What Petitioners insist should have been done was in fact done. Petitioners' insistence that this Court should grant the Writ to direct consideration of debtor- and market-specific traits to set the interest rate is nonsensical in the face of a Court of Appeals ruling that the Bankruptcy Court did just that.

CONCLUSION

The Petitioners position is abundantly clear - they wish to be compensated at an interest rate far in excess of the *Till* formula of the prime rate + a 1-3% risk adjustment; far in excess of the actual efficient market-produced rate for senior secured debt in the home healthcare industry; and, it is also noteworthy, far in excess of the pre-petition rate they were receiving under their contract. Pet. App. 117a-118a, 120a. In seeking an interest rate that would under the formulaic language of *Till* have to be expressed as at least prime +7.75%, that is nearly double the rate produced in the efficient market, and that is nearly double the prepetition contract rate, Petitioners ignore the fundamental reality that the Bankruptcy Code expressly allows creditors to have their debts restructured, sometimes, as here, against their will. The Court of Appeals decision upholds an interest rate consistent with both the formula approach and an efficient market analysis under *Till* and there is no basis on which the Writ should be granted.

In an effort to avoid the above result, Petitioners attempt valiantly to reframe the issue and present arguments in such a way as to create the appearance of a conflict among the Courts of Appeal where none can possibly exist at this time. Arguments in support of an alleged conflict among the Circuits by citation to decisions that have been overruled present no justification for granting the Writ in this case. It remains to be seen how the caselaw will develop and how the several Courts of Appeal will implement *Till*; it is simply too soon to tell.

For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

Transcript Excerpt

* * * * *

[p. 188]

Q. Okay. This is a dumb question because I don't see anywhere in there where it says present value.

A. If you – if you have the correct rate and a coerced loan approach – if the coerced loan approach is applicable, and the rate is six-point-eight percent, and you pay six-point-eight percent, and the present value of the loan amount is 250-million.

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APPENDIX 2

Fam No. 2002-20
(Treasury Current Value of Funds Rate)

November 21, 2002

FINANCIAL ADMINISTRATION MEMORANDUM NO. 2002-020 (II.J.)

To: Bureau Assistant Directors, Administration
Chief Executive Officer, National Business Center
Bureau Finance Officers
Finance Officer, Financial Management Services
Director, Office of Acquisition and Property Management

From: William E. Webber /s/
Focus Leader, Asset and Debt Management
Office of Financial Management

Subject: Treasury Current Value of Funds Rate

Attached is a copy of the Federal Register, Volume 67, No. 205, page 65187, dated October 23, 2002, which contains the Current Value of Funds Rate (CVFR) for calendar year 2003. The CVFR is 2 percent for the period beginning on January 1, 2003, and ending on December 31, 2003.

The CVFR is required for use in the following financial calculations:

- Assessing interest charges for outstanding debts on claims owed to the Federal Government.

- Determining whether to accept cash discounts by paying early. Prompt Payment rules require agencies to analyze the total costs and total benefits to the Government of accepting a discount and paying early. The discount conversion formula is available at www.fms.treas.gov/prompt/formulas.html.

-Determining when to pay purchase card invoices when a rebate is offered by the credit card issuer. Prompt Payment rules require agencies to analyze the total costs and benefits to the government of taking advantage of a credit card issuer's rebate offered for early payment. A spreadsheet at www.fms.treas.gov/prompt/rebate/html automatically calculates when agencies should pay credit card invoices, based on the daily rebate basis points and the daily CVFR basis points.

Should you have any questions on this subject, please contact Michael Anthony on (202) 208-6824.

Attachment (PDF, HRML)

Prior Financial Administration
Memorandums on this Subject:

No. 2002-010 (II.J), July 8, 2002 - Active

Treasury Current Value of Funds Rate

The Current Value of Funds rate (CVFR) is used to calculate interest on overdue Federal Government receivables and to determine the effectiveness of taking cash discounts (1 TFM 6-8040.40) on Government payments. Interest charged is simple interest at the rate in effect at the time the debt becomes overdue. The rate of interest remains fixed for the duration of the indebtedness (1 TFM 6-8025.20). See Treasury's Cash Management Regulations 1 TFM Chapter 6-8000 for more information.

The CVFR is based on the Treasury Tax and Loan (TT&L) rate for the 12 month period ending the previous September 30, rounded to the nearest whole percent. Published quarterly until ~~1986~~, the CVFR is now published annually in the Federal Register by October 31. The rate is calculated quarterly on a 12 month rolling average of TT&L rate and is subject to revision only if the published rate changes by 2 percentage points at the close of the prior calendar quarter. Changes in the CVFR will be published in a TFM Bulletin.

Updates:

Current Rates

- Jan 1-Jun 30, 2003: 2.0%
- Jul 1-Dec 31, 2003: 3.0%

For a recorded message with the current rate available 24 hours a day call 202-874-6995.

Rate History

Prior to 1978, Federal agencies determined their own interest rates for overdue debt. Following are the rates in effect during the specified periods from march 1978 to date:

Time Period	Rate	TFM Bulletin No.	Fed. Reg.
1/1/02-12/31/03	2.00%	2003-02	Vol. 67/ Oct. 23, 2002/ 65187
7/02-12/31/02	3.00%	2002-05	Vol. 66/ Apr. 24, 2002/ 20203
1/1/02-6/30/02	5.00%	2002-02	Vol. 66/ Oct. 25, 2001/ 54060
1/1/01-12/31/01	6.00%	2001-02	Vol. 65/ Oct. 31, 2000/ 65040
1/1/00-12/31/00	5.00%	2000-03	Vol. 64/ Oct. 29, 1999/ 58467
1/1/99-12/31/99	5.00%	99-03	Vol. 63/ Oct. 30, 1998/ 58457
1/1/98-12/31/98	5.00%	98-05	Vol. 62/ Oct. 28, 1997/ 55848
1/1/97-12/31/97	5.00%	97-02	Vol. 61/ Oct. 30, 1996/ 56086
1/1/96-12/31/96	5.00%	96-02	Vol. 60/ Oct. 26, 1995/ 54911

7/1/95-12/31/95	5.00%	95-08	Vol. 60/ Apr. 28, 1995/ 21024
1/1/95-6/30/95	3.00%	95-06	Vol. 59/ Nov. 1, 1994/ 54672
1/1/94-12/31/94	3.00%	94-03	Vol. 58/ Oct. 28, 1993/ 58037
1/1/93-12/31/93	4.00%	93-02	Vol. 57/ Oct. 27, 1992/ 48651
1/1/92-12/31/92	6.00%	92-03	Vol. 56/ Oct. 28, 1991/ 55521
1/1/91-12/31/91	8.00%	91-02	Vol. 55/ Oct. 30, 1990/ 45710
1/1/90-12/31/90	9.00%	90-02	Vol. 54/ Oct. 30, 1989/ 45886
1/1/89-12/31/89	7.00%	89-02	Vol. 53/ Nov. 15, 1988/ 46010
1/1/88-12/31/88	6.00%	88-02	Vol. 52/ Nov. 30, 1987/ 45523
1/1/87-12/31/87	7.00%	87-03	Vol. 51/ Nov. 25, 1986/ 42673
1/1/86-12/31/86	8.00%	86-02	Vol. 50/ Oct. 31, 1985/ 45524
10/1/85-12/31/85	9.00%	85-16	Vol. 50/ Aug. 5, 1985/ 31668
7/1/85-9/30/85	9.00%	85-11	Vol. 50/ May 2, 1985/ 18761

4/1/85-6/30/85	9.00%	85-05	Vol. 50/ Jan. 31, 1985/ 4609
1/1/85-3/31/85	9.00%	85-04	Vol. 49/ Oct. 31, 1984/ 43830
10/1/84-12/31/84	9.00%	84-17	Vol. 49/ Aug. 3, 1984/ 31190
7/1/84-9/30/84	9.00%	84-12	Vol. 49/ Apr. 30, 1984/ 18373
4/1/84-6/30/84	9.00%	84-09	Vol. 49/ Jan. 27, 1984/ 3560
1/1/84-3/31/84	9.00%	84-04	Vol. 48/ Oct. 26, 1983/ 49571
10/1/83-12/31/83	9.00%	83-29	Vol. 48/ Jul 26, 1983/ 33961
7/1/83-9/30/83	11.00%	83-21	Vol. 48/ May 2, 1983/ 19814
4/1/83-6/30/83	13.00%	83-15	Vol. 48/ Jan 25, 1983/ 3443
1/1/83-3/31/83	13.00%	83-05	Vol. 47/ Oct. 29, 1982/ 49137
10/1/82-12/31/82	11.98%	82-26	Vol. 47/ Sept. 20, 1982/ 41459
7/1/82-9/30/82	14.26%	82-16	Vol. 47/ Jun. 18, 1982/ 26489
4/1/82-6/30/82	13.22%	82-09	Vol. 47/ Mar. 19, 1982/ 12006

1/1/82-3/31/82	14.39%	82-05	Vol. 46/ Dec. 16, 1981/ 61383
10/1/81-12/31/81	18.35%	81-14	Vol. 46/ Sep. 17, 1981/ 46273
7/1/81-9/30/81	16.19%	81-09	Vol. 46/ Jun. 17, 1981/ 31804
4/1/81-6/30/81	17.74%	81-06	Vol. 46/ Mar. 25, 1981/ 18637
1/1/81-3/31/81	13.14%	81.04	
10/1/80-12/31/80	9.09%	80-11	
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In the Supreme Court of the United States

NEXBANK SSB, ET AL.,
Petitioners,

v.

AMERICAN HOMEPATIENT, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY BRIEF 1

THE COURT OF APPEALS' DECISION CONFLICTS WITH *TILL*'S INSTRUCTION THAT THE DETERMINATION OF THE APPROPRIATE DISCOUNT RATE REQUIRES CONSIDERATION OF CHARACTERISTICS SPECIFIC TO THE DEBTOR AND TO THE LOAN 1

CONCLUSION 5

TABLE OF AUTHORITIES

Case

Till v. SCS Credit Corporation,
541 U.S. 465 (2004) 1, 2, 3, 4, 5

Statute

11 U.S.C. § 1129(b)(2)(A)(i)(II) 2

THE COURT OF APPEALS' DECISION CONFLICTS WITH *TILL*'S INSTRUCTION THAT THE DETERMINATION OF THE APPROPRIATE DISCOUNT RATE REQUIRES CONSIDERATION OF CHARACTERISTICS SPECIFIC TO THE DEBTOR AND TO THE LOAN.

The Court's plurality opinion in *Till v. SCS Credit Corporation* adopted the formula approach for determining the appropriate discount rate for cramdown loans in the Chapter 13 context. 541 U.S. 465, 478-80 (plurality op.). Under the formula approach, a bankruptcy court begins with a risk-free interest rate and adjusts it upward in consideration of "such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization." *Id.* at 479 (plurality op.) The purpose of this adjustment is "to ensure that an objective economic analysis would suggest the debtor's interest payments will adequately compensate all such creditors for the time value of money and the risk of default." *Id.* at 477 (plurality op.).

Since debtors, reorganization plans, and loan terms differ in every bankruptcy case, it is impossible to prescribe a discount rate or even a range of discount rates that will adequately compensate creditors without regard for the particular facts of the case. As the Court recognized in *Till*, circumstances might require a discount rate that is "eye-popping." 541 U.S. at 480-81 (plurality op.). However, the Court's response to this situation was not to instruct the bankruptcy court to reduce the discount rate but to conclude that "the plan probably should not be confirmed." *Id.*

The importance of an objective evidentiary analysis to determine whether the secured creditor receives adequate compensation in a cramdown is not lessened in a Chapter 11

reorganization case, which is very different from a Chapter 13 case. As the Court recognized in *Till*, Congress likely "intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under" the present value provisions in Chapters 11, 12, and 13. *Id.* at 474 (plurality op.).

In addition, the applicable statute, 11 U.S.C. § 1129(b)(2)(A)(i)(II), states plainly that the value of the "deferred cash payments" a secured creditor receives in a cramdown must have a value as of the plan's effective date "of at least the value of such holder's interest in the estate's interest in such property." 11 U.S.C. § 1129(b)(2)(A)(i)(II); *see Till*, 541 U.S. at 469 (plurality op.) (where the debtor's plan provides for installment payments, "the amount of each installment must be calibrated to ensure that, over time, the creditor receives disbursements whose total present value [as of the effective date of the plan] equals or exceeds that of the allowed claim."). To satisfy the requirements of *Till*, the total present value must be determined by debtor-specific evidence, and not by reliance on generic industry averages. That was not done in this case.

In disregard of the Court's clear instruction and economically sound reasoning in *Till*, the court of appeals' opinion and Debtors' Brief in Opposition adopt an approach that ignores economic realities. The bankruptcy court in this case followed the "coerced loan theory," which, under Sixth Circuit precedent, directed bankruptcy courts to "the use of 'more generally applicable rates' and not loan-specific rates." Pet. App. 117a (citation omitted). Accordingly, the bankruptcy court accepted the discount rate proposed by Debtors' expert, even though his analysis failed to consider Debtors' specific circumstances (*e.g.*, leverage and business risks) or the specific characteristics of the cramdown loan

(*e.g.*, debt-to-value ratio). Pet. App. 111a, 120a. The expert instead merely determined an interest rate for generic non-amortizing, non-investment grade senior debt in the healthcare industry. Pet. App. 111a.

Despite the bankruptcy court's explicit determination not to consider "loan-specific rates" and its adoption of a discount rate that failed to consider characteristics specific to Debtors or to the cramdown loan, the court of appeals remarkably concluded that "[o]ur understanding of the bankruptcy court's methodology, however, is that it in fact sought to determine what an efficient market would have produced for the loan that the lenders provided, albeit under the rubric of the coerced loan theory." Pet. App. 18a; *see also* Br. Opp'n 8-9. In affirming the bankruptcy court's decision on this ground, the court of appeals approved an approach to determining the discount rates on cramdown loans that conflicts with the Court's guidance in *Till*.

In seeking to justify its conclusion, the court of appeals misinterpreted two parts of the *Till* decision, misinterpretations that Debtors employ with a vengeance. First, although the plurality opinion in *Till* noted that "[w]e do not decide the proper scale for the risk adjustment, as the issue is not before us," it went on to observe that "other courts have generally approved adjustments of 1% to 3%." 541 U.S. at 480 (plurality op.). The court of appeals interpreted this plainly descriptive statement as normative: "The opinion . . . cited with approval the fact that other courts starting from the prime rate 'have generally approved adjustments of 1 % to 3 %.'" Pet. 19a (citation omitted). For Debtors, this 1-3% observation becomes evidence that the discount rate sought by Petitioners is conclusively excessive. Br. Opp'n 2, 3, 6, 15, 16. It defies sound economic reasoning for the court of appeals and Debtors to use the 1-

3% range in this manner. The risk of default that a creditor faces can only be determined by examining the facts on the ground, *i.e.*, the specific characteristics of the debtor and of the loan. The range of possible risk adjustments cannot be stated as an absolute and unwavering legal rule without regard for the risks presented by the individual debtor as shown by the evidence in each case.

Examination of the circumstances of the estate, the nature of the security, and the duration and feasability of the reorganization might require a high cramdown discount rate in a particular case. For instance, a proper cramdown analysis under *Till* would produce a high discount rate for a secured creditor of a domestic automobile manufacturer in bankruptcy, where the plan of reorganization calls for a 20-year payout to the secured creditor and the creditor's claim is secured by old or obsolete factories and facilities that have no value above the creditor's loan amount. As this example shows, an appropriate discount rate cannot be determined consistent with *Till* unless the market-based risk characteristics of the specific debtor, as shown by the evidence at the confirmation hearing, are considered.

Second, both the court of appeals and Debtors misinterpret the Court's reference to an "'eye-popping' interest rate." *Till*, 541 U.S. at 480-81 (plurality op.) (citation omitted). The Court anticipated that a bankruptcy court, after analyzing the relevant factors in the specific case, might determine that a rate required "to compensate the creditor for its risk" could be "so high as to doom the plan." *Id.* at 480 (plurality op.). (The fact that the Court anticipated such a situation shows that the 1-3% observation was not intended to be normative.) The Court concluded that the proper response in such a situation is to not confirm the reorganization plan. *Id.* at 480-81 (plurality opinion). The

court of appeals misused this clear statement as evidence against the discount rate sought by Debtors: "The interest rate demanded by the lender here . . . . As such, the 12.16% rate appears to fall under the "eye-popping" category described unfavorably by *Till*." Pet. App. 19a; *see also* Br. Opp'n 7, 10. However, *Till* made no judgment about the propriety of high interest rates. Instead, *Till* rightly recognized that the proper interest rate depends on the facts on the ground, and that other things might need to be altered in consideration of the required interest rate in a particular case.

CONCLUSION

The Sixth Circuit is bound by this Court's *Till* decision. The Court should grant the petition.

Respectfully submitted,

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